* Together with Myers v. MacKenzie

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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 181

A. HOWARD MYERS, INDIVIDUALLY AND AS ACTING REGIONAL DIRECTOR FOR THE FIRST REGION, NATIONAL LABOR RELATIONS BOARD, ET AL., PETITIONERS

vs.

BETHLEHEM SHIPBUILDING CORPORATION, LTD.

No. 182

A. HOWARD MYERS, EDMUND J. BLAKE, AND DANIEL M. LYONS, INDIVIDUALLY AND AS THE NATIONAL LABOR RELATIONS BOARD, PETITIONERS

vs.

CHARLES MacKENZIE, INDIVIDUALLY AND AS CHAIRMAN, JAMES E. MANNING, ETC., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 30, 1937
CERTIORARI GRANTED OCTOBER 11, 1937

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

OCTOBER TERM, 1935.

No. 3189.

A. HOWARD MYERS ET AL.,

INDIVIDUALLY AND AS THE NATIONAL LABOR RELATIONS BOARD,
DEFENDANTS, APPELLANTS,

v.

BETHLEHEM SHIPBUILDING CORPORATION, Ltd.,

PLAINTIFF, APPELLEE.

No. 3190.

SAME

v.

CHARLES MacKENZIE ET AL.

PLAINTIFFS, APPELLEES.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF MASSACHUSETTS,
FROM INTERLOCUTORY DECREES (BREWSTER, J.), MAY 28, 1936.

TRANSCRIPT OF RECORD.

CHARLES FAHY,
GENERAL COUNSEL, NATIONAL LABOR RELATIONS BOARD,
ROBERT B. WATTS,
ASSOCIATE GENERAL COUNSEL, NATIONAL LABOR RELATIONS BOARD,
MALCOLM F. HALLIDAY,
ATTORNEY,
for Appellants.

B. A. BRICKLEY,
BRICKLEY, SEARS & COLE,
for CHARLES MACKENZIE ET AL., *Appellees.*

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UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

OCTOBER TERM, 1935.

No. 3189.

A. HOWARD MYERS ET AL.,
INDIVIDUALLY AND AS THE NATIONAL LABOR RELATIONS BOARD,
DEFENDANTS, APPELLANTS,

v.

BETHLEHEM SHIPBBUILDING CORPORATION, LTD.,
PLAINTIFFS, APPELLEES.

TRANSCRIPT OF RECORD OF DISTRICT COURT

No. 4321, EQUITY DOCKET.

BETHLEHEM SHIPBUILDING CORPORATION, LTD.,
PLAINTIFF,

v.

A. HOWARD MYERS, EDMUND J. BLAKE AND DANIEL M. LYONS, INDIVIDUALLY AND AS THE NATIONAL LABOR RELATIONS BOARD,
DEFENDANTS.

The bill of complaint for restraining order and injunction and petition for declaratory judgment is filed in the clerk's office on April 27, 1936, and is duly entered at the present March Term of this court, A. D. 1936, and is in the words and figures following:

BILL OF COMPLAINT FOR RESTRAINING ORDER AND INJUNCTION AND PETITION FOR DECLARATORY JUDGMENT.

[Filed April 27, 1936.]

BETHLEHEM SHIPBUILDING CORPORATION, LTD., a corporation,

Plaintiff;

—against—

A. HOWARD MYERS,
individually and as Acting Regional Director for the First Region, National Labor Relations Board, and as the National Labor Relations Board,

EDMUND J. BLAKE,
individually and as Regional Attorney for the First Region, National Labor Relations Board, and as the National Labor Relations Board; and

DANIEL M. LYONS,
individually and as Trial Examiner of the National Labor Relations Board designated or to be designated by the National Labor Relations Board and as the National Labor Relations Board,

Defendants.

To the Honorable Judges of the District Court of the United States for the District of Massachusetts:

The plaintiff, Bethlehem Shipbuilding Corporation, Ltd., brings this its bill of complaint for a restraining order and injunction and its petition for a declaratory judgment against the parties defendant named herein, and for its cause of action respectfully shows to this Honorable Court:

1. The plaintiff, Bethlehem Shipbuilding Corporation, Ltd., is a corporation organized and existing under the laws

of the State of Delaware, and is a citizen of the United States and of the State of Delaware.

2. On July 5, 1935, the President of the United States approved an Act of Congress styled Public—No. 198—74th Congress, known as the "National Labor Relations Act," (hereinafter sometimes referred to as the Act) which Act provides, among other things, for the creation of a board to be known as the "National Labor Relations Board," to be composed of three members appointed by the President by and with the advice and consent of the Senate. Acting under the supposed authority of the Act, the President appointed J. Warren Madden as Chairman and member and John M. Carmody and Edwin S. Smith as members of said Board, and said persons having been confirmed in their appointment by the Senate on August 24, 1935, duly qualified, and are now purporting to act as the National Labor Relations Board and are sometimes hereinafter referred to as such National Labor Relations Board. Said Madden, Carmody and Smith are citizens of the United States. Said Madden is a citizen of the State of Pennsylvania; said Carmody is a citizen of the State of New York; and said Smith is a citizen of the Commonwealth of Massachusetts. Said Madden, Carmody and Smith would appear to be proper parties defendant herein, but are not necessary parties defendant herein and are not named parties defendant because they are not, as the plaintiff is advised, personally within the jurisdiction of this Honorable Court. Although said Madden, Carmody and Smith have not been named as parties defendant herein for the foregoing reason, the plaintiff desires to have them granted the right to become parties defendant herein with all of the rights of parties defendant and not limited to an appearance before this Court as *amici curiae*, or in any other capacity with rights inferior to those of actual parties defendant herein.

3. The plaintiff is informed and believes and therefore alleges that the defendant A. Howard Myers is a citizen of the United States and of the Commonwealth of Massachusetts, residing in said Commonwealth of Massachusetts, and has been appointed and is now acting as Acting Regional Director for the First Region, National Labor Relations Board, having been designated as such by said Madden, Carmody and Smith, acting as said National Labor Relations Board, and is charged with the duty of prosecuting inquiries and investigations under the Act, and doing other things as provided by Article IV of the Rules and Regulations of said Board hereinafter more specifically referred to, and is now acting as said National Labor Relations Board in the Commonwealth of Massachusetts, among other places, under the title of "Acting Regional Director of the First Region, National Labor Relations Board," and is sued herein individually and as such Acting Regional Director and as such Board.

4. The plaintiff is informed and believes and therefore alleges that the defendant Edmund J. Blake is a citizen of the United States and of the Commonwealth of Massachusetts, residing in said Commonwealth of Massachusetts, and has been appointed and is now acting as Regional Attorney for the First Region, National Labor Relations Board, having been designated as such by said Madden, Carmody and Smith acting as said National Labor Relations Board, and is charged with the duty of prosecuting inquiries and investigations under said Act and doing other things as provided by Article IV of the aforesaid Rules and Regulations of said Board, and is now acting as said National Labor Relations Board in the Commonwealth of Massachusetts, among other places, under the title of "Regional Attorney, First Region, National Labor Relations Board" and is sued herein individually and as such Regional Attorney and as such Board.

5. The plaintiff is informed and believes and therefore alleges that the defendant Daniel M. Lyons is a citizen of the United States and has been appointed to act and is now acting as Trial Examiner of the National Labor Relations Board in the proceedings to begin with the hearing scheduled to be held on April 27, 1936, and hereinafter more specifically referred to. Said Daniel M. Lyons has been designated as such Trial Examiner by said Madden, Carmody and Smith, acting as the National Labor Relations Board, to preside at said hearing, and is charged with the duty of prosecuting inquiries and investigations under the Act in respect thereof and of doing other things as provided by Article IV of the aforesaid Rules and Regulations of said Board, and is now acting as the National Labor Relations Board in the Commonwealth of Massachusetts, among other places, under the title of "Trial Examiner," and is sued herein individually and as such Trial Examiner and as such Board.

6. The plaintiff is now and has been for many years engaged in the operation of a certain integrated manufacturing plant comprising a shipyard designed and used for the building of merchant and naval vessels, located on the waterfront of Weymouth Fore River, at Quincy and Braintree, Massachusetts, known as the Fore River Plant of the plaintiff (hereinafter sometimes referred to as the Fore River Plant), which covers approximately one hundred and twenty acres of land. Such plant contains numerous buildings, fixtures and equipment necessary to the conduct of the business of the plaintiff, including eight shipbuilding slips, five piers at which ships are completed after the launching thereof, a plate shop, a pattern shop, a mould loft, an electric shop, a riggers loft, a machine shop, a blacksmith shop, a pipe and copper shop, a carpenter and joiner shop, a paint shop, a boiler shop, a sheet metal shop, a brass and aluminum foundry, a storeroom, four warehouses, a power house and

a power house sub-station, an employment office, a hospital, an emergency first-aid hospital, two plate and shape storage yards, pickling and wash tanks, a galvanizing plant, a building for foundry flask storage, two assembly and storage areas, a building for bending boiler tubes, a lumber store building and dry kilns, a scrap yard, two air compressor stations, a bolt, nut and rivet reclaiming plant, a material testing house, an apprentice school building, a boiler plant for burning waste material, an administrative office building, a main office building, miscellaneous storerooms and offices, and other miscellaneous equipment and accessories. Such plant is equipped with the necessary lathes, pipe benders, punches, shears, rolls, steam hammers, keel benders, electric and spot welding equipment, shop, pier, storeroom and yard cranes, complete woodworking equipment, complete sheet metal fabricating equipment, complete equipment for building water tube boilers, and other machinery necessary to the operation of such integrated manufacturing plant in the conduct at the Fore River Plant of the plaintiff's business of building vessels and performing certain other manufacturing and processing operations.

7. The plaintiff at the Fore River Plant engages in the business of designing and building vessels of various kinds, sizes and descriptions only under specific contracts with those for whom such vessels are being built, except that to the extent of approximately 2.5% of its business it manufactures on specific orders miscellaneous machine products and performs certain metal processing operations. The plaintiff at the present time employs at said Plant in connection with such business approximately five thousand employees, each of whom is engaged at said Plant in connection with the shipbuilding, designing, manufacturing and processing operations of the plaintiff.,

8. In the designing and building of vessels, which always has constituted and still constitutes for the most part the business of the plaintiff at the Fore River Plant, it is necessary for the plaintiff to, and the plaintiff does, fabricate and shape in its shops at said Plant especially for each vessel built there practically all the materials used by the plaintiff in building such vessels, and the plaintiff builds for the most part the boilers and main propelling machinery for each of such vessels. The plaintiff delivers at the Fore River Plant the vessels built and the articles manufactured by it there to those persons for whom they are built or manufactured. The cost of materials used in building vessels at said Plant represents less than one-half of the cost to the plaintiff of building such vessels. The vessels and other articles being or to be built or constructed at said Plant bear, and will bear, no resemblance to the materials from which they are, or will be, built or constructed. Such vessels and other articles, when finished are, and will be, of far greater value than the materials which are, and will be, used in building and constructing them. The substantial increase in value is, and will be, due to the manufacturing, fabricating and building operations performed by the plaintiff at said plant.

9. The Act provides in Section 7 that:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

By Section 8 thereof it is made "an unfair labor practice" for an employer:

"(1) To interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7.

"(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it; *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay."

10. On the 14th day of April, 1936, the plaintiff received from the National Labor Relations Board at an office maintained by the plaintiff at Quincy, Massachusetts, a certain paper consisting of two parts, each dated April 13, 1936, and entitled, respectively, "Complaint" and "Notice of Hearing," and a copy of "Rules and Regulations—Series 1" of the National Labor Relations Board, dated September 14, 1935, which copy said Notice of Hearing stated were enclosed therewith. A copy of said paper and a copy of said Rules and Regulations are attached hereto marked Exhibits A-1 and A-2, respectively, and are hereby made a part hereof. The aforesaid Complaint and Notice of Hearing were signed by the defendant A. Howard Myers as Acting Regional Director for the First Region, National Labor Relations Board. In signing said Complaint and Notice of Hearing said defendant Myers, as stated therein, was acting as agent of the National Labor Relations Board, and was acting as such Board. Said Complaint and said Notice of Hearing are the Complaint and Notice of Hearing of the National Labor Relations Board. In said Notice of Hearing the plaintiff was notified that a hearing would take place on April 27, 1936, at 10 o'clock in the forenoon, in Room 1309, Post Office Building, Boston, Massachusetts, before the National Labor Relations Board.

11. As said Complaint shows, said hearing scheduled to be held on April 27, 1936, is called for the purpose of determining whether or not the plaintiff has engaged at the Fore

River plant in the so-called unfair labor practices alleged in said Complaint. The plaintiff is advised, believes and therefore alleges that no hearing has been held and no evidence whatsoever has been adduced at any hearing by or before the National Labor Relations Board or any agent or agency thereof as a basis for any of the allegations made by such Board in said Complaint. If the National Labor Relations Board, after said hearing and proceedings had thereon in accordance with rules and regulations prescribed by it, shall continue to maintain that the plaintiff has engaged in said alleged so-called unfair labor practices, or either of them, said Board will proceed to issue and cause to be served on the plaintiff pursuant to the provisions of Section 10 (c) of the Act, an order requiring the plaintiff to cease and desist from such practices and to take other affirmative action as prescribed by said Board. Upon the failure of the plaintiff to comply with the provisions of such order, said Board will petition a United States Circuit Court of Appeals or a United States District Court, pursuant to the provisions of section 10 (e) of the Act, to direct the plaintiff to comply with such order of said Board.

12. The action by the National Labor Relations Board, its agents or agencies, including the defendants herein, to prevent the plaintiff from engaging in any practices at the Fore River Plant which they allege constitute some of the so-called unfair labor practices defined in the Act constitutes merely an unwarranted and unlawful intermeddling and interference by them in the business and affairs of the plaintiff at said Plant. In charging the plaintiff was engaging in unfair labor practices the National Labor Relations Board is holding the plaintiff up to public scorn as a violator of a law of the United States and thereby is causing it to incur the odium and ill will of the public and to be in disrepute, and is holding the plaintiff up to the scorn of its employees

and the public as an employer engaged in unfair labor practices to the detriment and injury of those persons employed by it, thereby causing it to incur the odium and ill will of such persons and the public and to be in disrepute therewith. Such public scorn of, odium of, ill will toward and disrepute of, the plaintiff and such scorn of, odium of, ill will toward and disrepute of the plaintiff on the part of those employed by it will continue and be magnified so long as the aforesaid hearing shall be scheduled and shall continue and so long as any proceedings connected therewith shall ensue and be continued.

13. In connection with the hearing of said Complaint, if it shall be held on April 27, 1936, or at any other time, the plaintiff is informed, believes and therefore avers that the National Labor Relations Board, its agents and agencies, including the defendants herein, intend to and, unless restrained by this Honorable Court, will exercise the power which Section 11 (1) of the Act purports to confer upon them, and will send and cause to be sent into the Fore River Plant of the plaintiff investigators, agents and representatives for the purpose of examining the plaintiff's books and records and interviewing the plaintiff's employees, and will issue, or cause to be issued, subpoenas requiring the attendance and testimony of the plaintiff's officials and employees and the production of any evidence which they may deem relevant to said hearing or any investigation prescribed by the National Labor Relations Board with respect thereto. Such attendance and the production of such evidence pursuant to the provisions of Section 11 (1) of the Act may be required from any place in the United States, or any Territory or possession thereof, at any designated place of hearing. Such attendance and such production of evidence, wherever required, will entail considerable loss in time and money to the plaintiff, thereby increasing its cost of operation, will

involve public disclosure of the plaintiff's private books, records, documents and trade secrets, thereby invading the rights of the plaintiff, and will disrupt and interfere with the business of the plaintiff. Furthermore, in order that the plaintiff may resist the charges which have been brought against it by the National Labor Relations Board in the aforesaid Complaint, it will be necessary that it incur great expense for counsel fees, for fees to its witnesses, and for traveling and other expenses, all of which are irrecoverable. Furthermore, in accordance with Section 37 of Article II of Rules and Regulations—Series 1 of the National Labor Relations Board, further hearings may be held in Washington, D. C., or at any other place in the United States. The holding of any such further hearings would put the plaintiff to further and added expense in order to protect its rights in any proceedings had at any place to which they should be transferred; none of which expense would be recoverable. Furthermore, the National Labor Relations Board, its agents and agencies, including the defendants herein, threaten to require many employees of the plaintiff at the Fore River Plant to appear before the aforesaid Trial Examiner, or before some other Trial Examiner who subsequently shall be designated to conduct such scheduled hearing, as witnesses; the appearance of whom at such hearing will interfere with, interrupt and cause damage to, the business of the plaintiff at said Plant which business must be performed expeditiously and without interference or interruption.

14. If the plaintiff shall not permit each member of the National Labor Relations Board and each of its agents and agencies, including the defendants herein, to take any action and to carry out any purposes the taking or carrying out of which requires that the plaintiff shall not resist, prevent, impede or interfere with any member of said Board or any of its

agents or agencies aforesaid in the performance of duties that the Act purports to confer upon them, the plaintiff will be threatened with the imposition of a fine in the maximum amount of $5,000, pursuant to the provisions of Section 12 of the aforesaid Act, and the officers and employees of the plaintiff will be threatened with the payment of such a fine or with imprisonment for as much as one year, or both, pursuant to the provisions of such Section 12. Such fine and imprisonment constitute such a heavy and stringent penalty as to preclude the plaintiff from seeking to exercise its constitutional rights unless the plaintiff shall be granted relief by this Honorable Court; and by reason of such threatened fine and imprisonment the plaintiff cannot prevent the attendance of its officers and employees as witnesses at said hearing, and such officers and employees will, under threat of fine and imprisonment, be compelled to give at such hearing confidential information pertaining to the business of the plaintiff at the Fore River Plant which they have gained during their employment by the plaintiff and which information the plaintiff is entitled to have preserved as confidential and the disclosure of which would result in damage to the plaintiff; and such fine and imprisonment constitute such a heavy and stringent penalty as to coerce the plaintiff into permitting the National Labor Relations Board, its agents and agencies, including the defendants herein, to invade the constitutional rights of the plaintiff, its officers and employees, without legal warrant.

15. Under the terms of the Act as the National Labor Relations Board, its agents and agencies, including the defendants herein, are attempting to enforce the Act against the plaintiff; and as Local No. 5 of the Industrial Union of Marine and Shipbuilding Workers of America seeks to have the Act enforced against the plaintiff, the plaintiff will be prohibited from bargaining with any of its employees in re-

spect of rates of pay, wages, hours of employment and other conditions of employment through the Plan of Employees' Representation of the employees of the plaintiff in effect at the Fore River Plant as it has done harmoniously and without disturbance or any labor trouble for many years since the adoption thereof in March, 1923. If the plaintiff shall insist upon so bargaining with its employees in violation of the terms of the Act as so attempted and sought to be enforced, it will be harassed by costly and expensive proceedings which will be, or will be caused to be, instituted by the National Labor Relations Board or some of its agents or agencies, including the defendants herein, pursuant to the provisions of said Section 10 of the Act, so that, in order to avoid said expenses, the plaintiff might be coerced against its wishes and desires to cease bargaining with any of its employees through said Plan of Employees' Representation. By being so coerced the plaintiff would be deprived of its right freely to bargain and contract with any of its employees and prospective employees through said Plan of Employees' Representation or in any other manner.

16. In September, 1934, Local No. 5 of the Industrial Union of Marine and Shipbuilding Workers of America petitioned under Public Resolution—No. 44—73d Congress the National Labor Relations Board (hereinafter referred to as the Old Labor Board) which was then in existence under such Public Resolution No. 44 to order and conduct an election by secret ballot of the employees of the plaintiff at the Fore River Plant to determine by what person or persons or organization they desired to be represented "in order to insure the right of employees to organize and to select their representatives for the purpose of collective bargaining as defined in Section 7 (a) of" the National Industrial Recovery Act and incorporated therein and also made certain charges that the plaintiff in laying off certain employees had discriminated

against them on account of union activities in violation of such Section 7 (a). Hearings were held at Boston, Massachusetts, beginning October 1, 1934, and extending throughout that entire month from time to time, some of such hearings continuing until late into the evening, and the final hearing having been held October 31, 1934. Such hearings were held before a representative of the Old Labor Board and two members of the New England Regional Labor Board then existing under such National Industrial Recovery Act and such Public Resolution No. 44. Thereafter, on December 18, 1934, the case was formally and thoroughly argued before the Old Labor Board with all three members thereof sitting, and after it had been thoroughly briefed by counsel for the plaintiff and by the representative of said Local No. 5, such briefs having been filed upon such argument. Such case was entitled "In the Matter of Bethlehem Shipbuilding Corporation, Ltd., Industrial Union of Marine and Shipbuilding Workers of America, Local No. 5, and Employees Representation Plan, Fore River Plant, National Labor Relations Board Case No. 135" (hereinafter referred to as the First Fore River Case). On February 13, 1935, the Old Labor Board issued its decision in such case which was signed by all three members thereof including Edwin S. Smith, now a member of the present National Labor Relations Board. By that decision the Old Labor Board denied the petition of said Local No. 5 for the holding of an election by secret ballot of the employees of the plaintiff at the Fore River Plant, and also found that the plaintiff had not discriminated against any of the persons with respect to whom discrimination by it on account of union activities had been charged.

17. The out-of-pocket costs to the plaintiff in connection with the First Fore River Case were in excess of $15,000, including purchase of the transcript of record of approximately 1,550 typewritten pages, traveling and hotel expenses,

counsel fees, printing costs and other incidental expenses. In defending itself against the alleged discrimination charges and in connection with the petition for an election in the First Fore River Case there were called as witnesses on behalf of the plaintiff and on behalf of the General Body under said Plan of Employees' Representation (a party in said case) a total of eighteen officials and employees of the plaintiff at the Fore River Plant. In its effort to substantiate the charges which it made in its petition for an election and with respect to its charge of discrimination ten other employees at the Fore River Plant were called by said Local No. 5 in the First Fore River Case. Moreover a number of the foremen and leading men of the plaintiff at the Fore River Plant as well as other employees were required from time to time to be in attendance at the hearings in the First Fore River Case. As a result of the attendance at such hearings of such foremen, leading men and employees, and of officials of the plaintiff, including those who were witnesses at such hearings, a total of not less than two thousand five hundred working hours away from said Plant were spent in attendance at such hearings. In addition to such two thousand five hundred working hours, a very great number of working hours was spent by such foremen, leading men, employees and officials in connection with and in preparation for such hearings. Several officials of the plaintiff were required to spend many days at said hearings and in connection therewith in order to assist counsel for the plaintiff in properly defending the plaintiff thereat. The General Manager of said Plant and the Assistant General Manager thereof in particular were required to spend by far the greater part of the entire month of October, 1934, in connection with such hearings. As a result of the aforesaid attendance of employees and officials of the plaintiff at such hearings and the time spent by them in connection therewith and in preparation therefor a large amount of working time was lost which resulted in very substantial,

irreparable and irrecoverable loss and injury to the plaintiff, in addition to said out-of-pocket cost in excess of $15,000, which could not be calculated in a pecuniary amount.

18. Since the date of the afore-described hearings and decision of the Old Labor Board in the First Fore River Case there has been no change in the operation of said Plan of Employees' Representation or in the policy or actions of the plaintiff with respect thereto, as to all of which, as well as of said hearings and decision, the defendants herein and the aforesaid members of the National Labor Relations Board are fully cognizant and informed. Furthermore, the provisions of Section 7 of the National Labor Relations Act are similar to the provisions of Section 7 (a) of the National Industrial Recovery Act, and Section 8 of the National Labor Relations Act sets forth the requirements of such Section 7 (a) of the National Industrial Recovery Act as they were interpreted by the Old Labor Board under the provisions of such Public Resolution No. 44 and as it sought to apply them. Such petition for an election was made pursuant to the provisions of such Public Resolution No. 44, and in connection with such petition for election, as well as in connection with such charges of discrimination made therein, said Local No. 5 alleged that the plaintiff had violated the provisions of such Section 7 (a). The records of the Old Labor Board, including all the records in the First Fore River Case, are now the records of the National Labor Relations Board (Section 4 (b) of the National Labor Relations Act). Despite the knowledge of the National Labor Relations Board and its members, agents, and agencies, including the defendants herein, of the facts in connection with said Plan of Employees' Representation and the policy and acts of the plaintiff as herein set forth and of the decision of the Old Labor Board in the First Fore River Case, the National Labor Relations Board and its agents and agencies, includ-

ing the defendants herein, issued against the plaintiff the aforesaid Complaint dated April 13, 1936, and scheduled the aforesaid hearing to be held April 27, 1936. The loss, damage and injury which the plaintiff will suffer as a result of the holding and continuation of the said hearing and any proceedings had thereon or in connection therewith and the taking and carrying out of any action in connection therewith will be similar to and as great as or greater than that suffered by the plaintiff as a result of the First Fore River Case. Said damage and injury is imminent and will be irreparable, and cannot be ascertained in a pecuniary value.

19. The plaintiff has the right to maintain pleasant, friendly and harmonious relations with its employees, and has the right freely and independently to bargain with any of its employees in respect of rates of pay, wages, hours of employment and other conditions of employment in any manner that shall be mutually satisfactory to it and to any of such employees. The pecuniary value of all such rights to the plaintiff is incalculably great and the inviolate maintenance thereof is a fundamental condition to the successful conduct by the plaintiff of its business at the Fore River Plant. The pendency of and the holding of the hearing scheduled to be held on April 27, 1936, the continuation thereof and the holding and continuation of any further proceedings thereon or in connection therewith, regardless of the outcome thereof, and the taking or carrying out of any action in connection therewith will prevent the plaintiff from fully maintaining and enjoying the benefits of and exercising such rights, by reason whereof the pleasant, friendly and harmonious relations with its employees will be infringed and damaged and the enjoyment of the benefits thereof will be impeded because of the facts herein set forth. The fact that the plaintiff will be impeded as herein described from exercising its right freely and independently to bargain with

any of its employees in respect of rates of pay, wages, hours of employment and other conditions of employment in any manner that shall be mutually satisfactory to it and to such employees, and thereby will be impeded in carrying on its regular business at the Fore River Plant, will result in the plaintiff suffering incalculable and heavy damage in the loss of prospective profits which it is not possible accurately to estimate in pecuniary value. Such damage will accrue and increase from day to day and will continue so to accrue and increase so long as the plaintiff shall be impeded in exercising such right, by the holding and continuation of said hearing and any proceedings had thereon or in connection therewith, including the prosecution of legal proceedings instituted under the Act either by the plaintiff on its own behalf or by the National Labor Relations Board against the plaintiff, and by the taking and carrying out of any action in connection therewith, and, if and when the plaintiff shall cease to be so impeded, it will suffer irreparable damage flowing from the fact that the efficiency of such employees will not be as great as it would have been had not the aforesaid disturbed and upset condition been created and maintained among such employees as a result of said hearing and continuation of proceedings thereon and action taken and carried out in connection therewith. The principal aim of Local No. 5 of the Industrial Union of Marine and Shipbuilding Workers of America in charging that the plaintiff has engaged in and is now engaging in the alleged so-called unfair labor practices set forth in the aforesaid complaint is to force the plaintiff to cease dealing with any of its employees with respect to rates of pay, wages, hours of employment and other conditions of employment through the Plan of Employees' Representation now in effect at said Plant. The holding and continuation of said hearing and any proceedings had thereon or in connection therewith and the taking and carrying out of any action in connection therewith will

make it appear that the accomplishment of such aim is in accordance with law and has the backing of the Federal Government, and will thus give to said Local No. 5 the opportunity to claim that the Federal Government is backing it in its demands. Such appearance and such claim will disturb conditions at said Plant and result in a burden and obstacle to the plaintiff in maintaining pleasant, friendly and harmonious relations with its employees and enjoying the benefits thereof. The plaintiff has no adequate remedy at law, nor any remedy whatsoever, for the prevention of the accrual and continuation of the damage and injury herein described flowing from the unlawful and unwarranted intermeddling and interference by the National Labor Relations Board, its agents and agencies, including the defendants herein, except by the injunction of this Honorable Court against the holding and continuation of said hearing and of any proceedings had thereon or in connection therewith and the taking or carrying out of any action in connection therewith.

20. For the purpose of protecting and promoting the interests of its employees at the Fore River Plant and in order to discuss and adjust matters of mutual interest and in order to avoid reasonable grounds of complaint with respect to rates of pay, wages, hours of employment and other conditions of employment, the plaintiff is now, and has heretofore been, ready and willing to meet at mutually convenient times with any persons claiming, directly or indirectly, to be the accredited representatives of such employees and has not challenged, and does not challenge, their right as such, and has been and is willing to consider with them any matters of interest to such employees which they may present to the plaintiff, and the plaintiff has not dominated or interfered with any representatives of its employees at said Plant nor with any persons claiming, directly

or indirectly, to be the accredited representatives of such employees, either under the Plan of Employees' Representation in effect at said Plant or otherwise. The plaintiff has frequently met with persons claiming, directly or indirectly, to be the accredited representatives of employees at the Fore River Plant, including the Employees' Representatives under the Plan of Employees' Representation in effect at said Plant and likewise members and officials of said Local No. 5 acting as a committee thereof, and has considered all matters of interest to employees at said Plant which have been presented to it.

21. The Plan of Employees' Representation of the employees of the plaintiff at the Fore River Plant in effect at said Plant provides that the employees shall hold thereunder in the month of March of each year a primary election and a final election known, respectively, as the Nominations and the Election. On March 9, 1936, the employees held such Nominations and on March 13, 1936, they held such Election. 91.9% of the employees of the plaintiff at the Fore River Plant who were eligible under said Plan to vote at Nominations and Elections (officials of the plaintiff and persons having the right of hiring and discharging employees not having the right under said Plan to vote at Nominations or Elections) and who were at said Plant on the day of such Nominations, which was a regular working day on which said Plant was operating at its then normal full time rate, without any domination, interference, intimidation or coercion on the part of the plaintiff, cast valid ballots, at such Nominations, which were counted thereat, and 96% of such eligible employees who were at said Plant on the day of such Election which also was a regular working day on which said Plant was operating at its then normal full time rate, without any domination, intimidation or coercion upon the part of the plaintiff, cast valid ballots at such Election which

were counted thereat. By so voting in such Election (as well as in such Nominations) such 96% of such employees of the plaintiff at said Plant approved the holding of such Nominations and Election under said Plan and expressed the desire that the manner of selecting those who for the ensuing year should represent such employees for the purposes of collective bargaining in respect of rates of pay, wages, hours of employment and other conditions of employment and other purposes under said Plan should be as set forth in said Plan and designated the Employees' Representatives who were elected at said Election to represent such employees for such purposes for such year.

22. The plaintiff further alleges that neither the actions undertaken by it in the transaction of its business at the Fore River Plant, nor its relations with its employees with respect thereto at said Plant constitute commerce among the several States or with foreign nations, nor do they directly affect such commerce, nor do they burden or obstruct such commerce or the free flow thereof, nor have they led, nor do they intend to lead, to labor disputes burdening or obstructing such commerce or the free flow thereof, nor do such actions occur or such relations exist in the course or current of commerce among the several States or with foreign nations, nor are they an integral part of the operations of instrumentalities of such commerce.

23. The plaintiff is advised by counsel, believes and charges that the National Labor Relations Act is wholly illegal and void, in that it violates the Constitution of the United States in the following, among other, respects:

(1) The Act cannot be sustained under the Commerce Clause contained in Section Eight of Article I of the Constitution of the United States, since it seeks to regulate mat-

ters concerning wholly intrastate business, including that of the plaintiff, as herein set forth, a regulation which does not constitute the regulation of commerce among the several States or with foreign nations.

(2) The Act is violative of the Tenth Amendment to the Constitution of the United States, in that it constitutes an invasion by the Federal Government of fields of regulation reserved by that Amendment to the States or to the People, because the Act is in purpose, in essence and on its face an attempt to regulate matters not committed to the Federal Government by the Constitution of the United States, by attempting to regulate local industry, including the relations between employers, including the plaintiff, and their employees in respect to rates of pay, wages, hours of employment and other conditions of employment.

(3) The Act is violative of the Ninth Amendment to the Constitution of the United States, in that by the Act the Government of the United States through the Congress has presumed and purported to assume jurisdiction and control of certain rights retained by the States or by the People.

(4) The Act is violative of the Fifth Amendment to the Constitution of the United States, in that

(a) it attempts to deprive employers and employees, including the plaintiff and its employees, without due process of law of the liberty guaranteed to them by that Amendment;

(b) it attempts to deprive employers and employees, including the plaintiff and its employees, without due process of law of their property rights, including the right of any employer to deal freely and independently with its employees or any of them or any group

thereof in respect to rates of pay, wages, hours of employment and other conditions of employment and the right of any employee to deal freely and independently with his employer in respect to rates of pay, wages, hours of employment and other conditions of employment in any manner;

(c) it attempts to take the private property of employers and employees, including the plaintiff and its employees, for a public use without the payment of just compensation;

(d) it is wholly unreasonable, arbitrary and capricious.

(5) The Act is violative of the Third Article of the Constitution of the United States, in that it purports to vest judicial power of the United States in large part in said National Labor Relations Board and not in the courts as required by said Article, and the Act thereby purports to infringe upon, and violate, the constitutional authority of the courts of the United States.

(6) The Act is violative of the First Amendment to the Constitution of the United States, in that it abridges the freedom of speech of employers, including the plaintiff.

(7) The Act is violative of the Fourth Amendment to the Constitution of the United States, in that it permits and authorizes unreasonable searches and seizures of papers and effect of employers, including the plaintiff, and deprives employers, including the plaintiff, of the right to be secure in their papers and effects.

(8) The Act is violative of the Seventh Amendment to the Constitution of the United States, in that no trial by jury is permitted or required by the Act.

(9) The Act is violative of the Thirteenth Amendment to the Constitution of the United States, in that it permits and authorizes a situation which would constitute involuntary servitude of employees, including the employees of the plaintiff.

The action taken and orders issued by the National Labor Relations Board, its agents or agencies, including the defendants herein, their successors in office, assistants, employees, agents and representatives, and particularly the determination to hold the aforesaid hearing, the issuance of the Complaint and Notice of Hearing dated April 13, 1936, relative thereto, the holding or attempting to carry out any of the provisions of the Act in connection with, and following upon, said hearing are, and will be, illegal and void, in that they violate the constitutional rights of the plaintiff in the foregoing, as well as in other, respects.

24. The plaintiff has been advised by counsel, believes and alleges that the procedure provided in the Act for the review of orders of the National Labor Relations Board does not afford the plaintiff a timely, plain, adequate, or complete remedy at law, since, among other reasons, the irreparable and irrecoverable damages and injuries to the plaintiff which are hereinbefore described and alleged will have been in a very large measure caused and suffered by the plaintiff before any such review can be had, and that, accordingly, it has no protection for its constitutional and property rights save by injunctive relief from this Honorable Court to which it is entitled; and, furthermore, that inasmuch as the Act is wholly unconstitutional and invalid as hereinbefore alleged, the remedy purportedly afforded by the Act in law and in fact is not a remedy at all.

25. The plaintiff has been advised by counsel, believes and alleges that the procedure provided by the Act for the

review of orders of the National Labor Relations Board by the courts of the United States, if it be a remedy at all, is not and is not intended as an exclusive statutory remedy and is not a timely, or a plain, or an adequate, or a complete remedy at law; and that the statutory provisions for review of the orders of such Board do not make any provision for an independent judicial determination of all questions, both of law and of fact, essential to the preservation of the constitutional rights of the plaintiff, nor is any provision made for an independent judicial determination upon the facts, as well as upon the law, of the existence or non-existence of the fundamental or jurisdictional facts underlying the supposed authority of the Congress, the existence of which is a condition precedent to the operation of the statutory scheme.

26. The damages, which will accrue to, and be suffered by, the plaintiff by reason of its being deprived of rights as herein set forth, are irreparable and are not wholly ascertainable in a pecuniary value, and the plaintiff would be unable to prove the full or exact amount thereof in any court of law, and is without a timely, plain, adequate or complete remedy at law.

27. This suit involves a controversy arising under the Constitution and laws of the United States, and the matters in interest involved are of a value in excess of the sum of $3,000, exclusive of interest and costs.

28. The plaintiff is advised by counsel, believes and alleges that it is entitled to receive from this Court a declaratory judgment declaring its rights in the premises.

WHEREFORE, the plaintiff prays:

1. That a temporary restraining order be granted forthwith restraining and enjoining the defendants A. Howard

Myers, individually and as Acting Regional Director for the First Region, National Labor Relations Board, and as the National Labor Relations Board, and Edmund J. Blake, individually and as Regional Attorney for the First Region, National Labor Relations Board, and as the National Labor Relations Board, and Daniel M. Lyons, individually and as Trial Examiner of the National Labor Relations Board designated or to be designated by the National Labor Relations Board and as the National Labor Relations Board, and each of them, and their agents, agencies, assistants, employees and representatives, and any one associated with them, and each of them, and their successors in office, and each of them, and their agents, agencies, assistants, employees and representatives, and any one associated with them, and each of them, from holding or causing to be held, at any time or times, a hearing for the purpose of determining whether or not the plaintiff has engaged at its Fore River Plant in any so-called unfair labor practices under the National Labor Relations Act, and from having any proceedings or taking any action whatsoever, at any time or times, with respect thereto.

2. That this Honorable Court issue its writ in due form of law directed to the defendants A. Howard Myers, individually and as Acting Regional Director for the First Region, National Labor Relations Board, and as the National Labor Relations Board, and Edmund J. Blake, individually and as Regional Attorney for the First Region, National Labor Relations Board, and as the National Labor Relations Board, and Daniel M. Lyons, individually and as Trial Examiner of the National Labor Relations Board designated or to be designated by the National Labor Relations Board, and to each of them, ordering them and each of them, at a certain day to appear before this Honorable Court and answer all and singular the matters and things herein set forth and complained of, but not under oath (answers under oath be-

ing expressly waived), and further to perform and abide by such order, direction and decree as to this Honorable Court shall seem meet, just and proper.

3. That this Honorable Court issue its order against defendants, A. Howard Myers, individually and as Acting Regional Director for the First Region, National Labor Relations Board, and as the National Labor Relations Board, and Edmund J. Blake, individually and as Regional Attorney for the First Region, National Labor Relations Board, and as the National Labor Relations Board, and Daniel M. Lyons, individually and as Trial Examiner of the National Labor Relations Board designated or to be designated by the National Labor Relations Board and as the National Labor Relations Board, and each of them, to show cause, if any they have, at a convenient date to be fixed by this Honorable Court, why a preliminary injunction shall not be granted, restraining the defendants A. Howard Myers, individually and as Acting Regional Director for the First Region, National Labor Relations Board, and as the National Labor Relations Board, and Edmund J. Blake, individually and as Regional Attorney for the First Region, National Labor Relations Board, and as the National Labor Relations Board, and Daniel M. Lyons, individually and as Trial Examiner of the National Labor Relations Board designated or to be designated by the National Labor Relations Board and as the National Labor Relations Board, and each of them, and their agents, agencies, assistants, employees and representatives, and anyone associated with them, and each of them, and their successors in office, and each of them, and their assistants, agents, agencies, employees and representatives, and any one associated with them, and each of them, during the pendency of this suit, from holding, or causing to be held, at any time or times, a hearing for the purpose of determining whether or not the plaintiff has engaged at its Fore River

Plant in any so-called unfair labor practices under the National Labor Relations Act, and from having any proceedings or taking any action whatsoever, at any time or times, with respect thereto.

4. That this Honorable Court grant and issue a preliminary injunction against the defendants, A Howard Myers, individually and as Acting Regional Director for the First Region, National Labor Relations Board, and as the National Labor Relations Board, and Edmund J. Blake, individually and as Regional Attorney for the First Region, National Labor Relations Board, and as the National Labor Relations Board, and Daniel M. Lyons, individually and as Trial Examiner of the National Labor Relations Board designated or to be designated by the National Labor Relations Board and as the National Labor Relations Board, enjoining them, and each of them, and their agents, agencies, assistants, employees and representatives, and any one associated with them, and each of them, and their successors in office, and each of them, and their agents, agencies, assistants, employees and representatives, and any one associated with them and each of them *pendente lite*, from holding or causing to be held, at any time or times, a hearing for the purpose of determining whether or not the plaintiff has engaged at its Fore River Plant in any so-called unfair labor practices under the National Labor Relations Act, and from having any proceedings or taking any action whatsoever, at any time, or times, with respect thereto.

5. That upon a final hearing this Honorable Court grant and issue a permanent injunction against the defendants, A. Howard Myers, individually and as Acting Regional Director for the First Region, National Labor Relations Board, and as the National Labor Relations Board, and Edmund J. Blake, individually and as Regional Attorney for the First

Region, National Labor Relations Board, and as the National Labor Relations Board, and Daniel M. Lyons, individually and as Trial Examiner of the National Labor Relations Board designated or to be designated by the National Labor Relations Board and as the National Labor Relations Board, enjoining them, and each of them, and their agents, agencies, assistants, employees and representatives, and any one associated with them, and each of them, and their successors in office, and each of them, and their agents, agencies, assistants, employees and representatives, and any one associated with them, and each of them, permanently and perpetually, from holding or causing to be held at any time or times, a hearing for the purpose of determining whether or not the plaintiff has engaged at its Fore River Plant in any so-called unfair labor practices under the National Labor Relations Act, and from having any proceedings or taking any action whatsoever, at any time or times, with respect thereto.

6. That this Honorable Court shall declare and order, adjudge and decree, that the National Labor Relations Act approved July 5, 1935, and defendants' actions and proposed actions thereunder in relation to the business of the plaintiff at its Fore River Plant and the relations between it and its employees there and among such employees are unconstitutional, void and unenforceable.

7. That the plaintiff may have such other and further relief in the premises as this Honorable Court shall deem just and proper.

BETHLEHEM SHIPBUILDING CORPORATION, LTD.
By JAMES H. WARD, *Vice-President.*

CLAUDE R. BRANCH,
Choate, Hall & Stewart.
HOYT A. MOORE,
E. FONTAINE BROWN,
Cravath, de Gersdorff, Swaine & Wood,
15 Broad Street,
New York, N. Y.
Solicitors for the Plaintiff.

STATE OF NEW YORK, ss.:
COUNTY OF KINGS;

JAMES H. WARD, being first duly sworn, according to law, upon oath deposes and says:

I am a citizen of the United States over twenty-one years of age and a resident of the City of New York in the State of New York, and I am a Vice-President of Bethlehem Shipbuilding Corporation, Ltd., the plaintiff above named. I have read the foregoing bill of complaint for restraining order and injunction and petition for declaratory judgment and know the contents thereof, and have executed the same in the name and on behalf of Bethlehem Shipbuilding Corporation, Ltd., and am duly authorized so to do and to make this affidavit. The allegations of the foregoing bill of complaint for restraining order and injunction and petition for declaratory judgment are true and correct to my knowledge, except allegations therein stated to be based upon information and belief, which allegations I believe to be true.

JAMES H. WARD.

Subscribed and sworn to before me
this 25th day of April, 1936.
CHARLES F. PARADISE,
Notary Public, Kings County,
Kings Co. Clerk's No. 126, Reg. No. 8141
N. Y. Co. Clerk's No. 330, Reg. No. 8P187
Commission expires March 30, 1938.
[L. S.]
April 27, 1936.

Restraining order May issue returnable Monday, May 4, 1936, at 2 P. M.

E. H. B.
D. J.

EXHIBIT A-1

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

First Region

In the Matter of

BETHLEHEM SHIPBUILDING CORPORATION, LTD.

and

INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, LOCAL NO. 5

CASE NO. 1-C-25

COMPLAINT

It having been charged by the Industrial Union of Marine & Shipbuilding Workers of America, Local No. 5, 1511 Hancock Street, Quincy, Massachusetts, that the Bethlehem Shipbuilding Corporation, Ltd., hereinafter called the respondent, has engaged in and is now engaging in certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, approved July 5, 1935, the National Labor Relations Board, by the Acting Regional Director for the First Region, as agent of the National Labor Relations Board, designated by the National Labor Relations Board Rules and Regulations, Series I (General Rules and Regulations), Article IV, Section 1, hereby alleges the following:

1. The respondent is and has been since October 30, 1917, a corporation organized under and existing by virtue of the laws of the State of Delaware, having its principal office and place of business in the City of Bethlehem, County of Northampton, State of Pennsylvania, and is now and has continu-

ously been engaged at a place of business in the City of Quincy, County of Norfolk, State of Massachusetts (hereinafter called the Fore River Plant) in the production, sale and distribution of boats, ships and marine equipment.

2. The respondent in the course and conduct of its business causes and has continuously caused large quantities of the raw materials used in the production of its boats, ships and marine equipment to be purchased and transported in interstate commerce from and through states of the United States other than the State of Massachusetts to the Fore River Plant in the State of Massachusetts, and causes and has continuously caused the boats, ships and marine equipment produced by it to be sold and transported in interstate commerce from the Fore River Plant in the State of Massachusetts to, into and through states of the United States other than the State of Massachusetts, all of the aforesaid constituting a continuous flow of trade, traffic and commerce among the several states.

3. The respondent, by its officers, agents and employees, while operating as described above, since March 1, 1923, down to and including the date of the filing of this complaint has dominated and interfered with a labor organization known as Plan of Representation of Employees in Plants of the Bethlehem Shipbuilding Corporation, Ltd. (hereinafter called the Employees Representation Plan).

4. The respondent has dominated and interfered with and continues to dominate and interfere with the Employees Representation Plan by causing its own representatives to be a component part of said Plan and has thereby exercised control over the deliberations and activities of the employees and their representatives in the operation of the Plan and thereby has prevented said employees from securing the benefits of genuine collective bargaining and has thereby en-

gaged in and is now engaging in an unfair labor practice within the meaning of Section 8, subdivision (1) of said Act.

5. By forming and assisting in the administration of said Employees Representation Plan and by contributing financial and other support to it, the respondent has dominated and interfered with and is now dominating and interfering with the said labor organization, and thereby has engaged in and is now engaging in an unfair labor practice within the meaning of Section 8, subdivision (2) of said Act.

6. Such acts and unfair labor practices when engaged in by employers in the shipbuilding industry and by employers in other industries have led and tend to lead to labor disputes, strikes and other forms of industrial unrest in said shipbuilding industry and in other industries, which have the intent and necessary effect of burdening and obstructing trade, traffic and commerce among the several states in raw materials and manufactured and processed goods, and burdening and obstructing the free flow of such trade, traffic and commerce among the several states, by occurring in the current of such commerce among the several states, and by materially affecting, restraining, and controlling the flow of such raw materials and manufactured and processed goods from and into the channels of commerce among the several states, and the prices of such materials and goods in such commerce.

7. The aforesaid acts and unfair labor practices of respondent prevent the employees of respondent from possessing full freedom of association and actual liberty of contract and create an inequality of bargaining power between respondent and its employees, which inequality of bargaining power substantially burdens and obstructs trade, traffic and commerce among the several states in the raw materials and manufactured and processed goods of said industry, and sub-

stantially burdens and obstructs the free flow of trade, traffic and commerce, and tends to aggravate recurrent business depressions among the several states, by depressing wage rates and the purchasing power of wage earners in said industry and by preventing the stabilization of competitive wage rates and working conditions within said industry and between said industry and other industries.

8. The aforesaid acts of respondent constitute unfair labor practices affecting commerce, within the meaning of Section 8, subdivisions (1) and (2) and Section 2, subdivisions (6) and (7), of said Act.

WHEREFORE, the National Labor Relations Board on the 13th day of April, 1936, issues its complaint against the Bethlehem Shipbuilding Corporation, Ltd., respondent herein.

NOTICE OF HEARING

PLEASE TAKE NOTICE that on the 27th day of April, 1936, at 10 o'clock in the forenoon, in Room 1309, Post Office Building, Boston, Massachusetts, a hearing will be conducted before the National Labor Relations Board, by a Trial Examiner to be designated in accordance with said Rules and Regulations, Series I, Article IV, and Article II, Section 22, on the allegations set forth in the complaint attached hereto, at which time and place you will have the right to appear, in person or otherwise, and give testimony.

You are further notified that you have the right to file with the Acting Regional Director for the First Region, acting in this matter as the agent of the National Labor Relations Board, an answer to the complaint attached hereto, within five (5) days after the service of said complaint.

Enclosed herewith for your information is a copy of

Rules and Regulations, Series I, made and published by the National Labor Relations Board pursuant to authority granted in the National Labor Relations Act. Your attention is particularly directed to Article II of said Rules and regulations.

IN WITNESS WHEREOF the National Labor Relations Board has caused this, its complaint and notice of hearing, to be signed by the Acting Regional Director for the First Region on the 13th day of April, 1936.

A. HOWARD MYERS,
Acting Regional Director for the First Region.

EXHIBIT A-2
NATIONAL LABOR RELATIONS BOARD
Washington, D. C.

Rules and Regulations—Series 1

General Rules and Regulations

By virtue of the authority vested in it by the National Labor Relations Act, approved July 5, 1935, the National Labor Relations Board hereby makes the following rules and regulations which it finds necessary to carry out the provisions of said Act. Said rules and regulations shall become effective upon publication in the manner prescribed in Article VI thereof and shall be in force and effect until amended or rescinded by rules and regulations hereafter made and published by said Board.

Signed at Washington, D. C.,
this 14th day of
September, 1935.

(Signed) J. WARREN MADDEN,
(Signed) JOHN M. CARMODY,
(Signed) EDWIN S. SMITH.

ARTICLE I.

DEFINITIONS

Section 1. The terms "person," "employer," "employee," "representatives," "labor organization," "commerce," "affecting commerce," and "unfair labor practice," as used herein, shall have the meanings set forth in Section 2 of the National Labor Relations Act, a copy of which Act is appended hereto.

Section 2. The term "Act" as used herein shall mean the National Labor Relations Act, and the term "Board" shall mean the National Labor Relations Board.

Section 3. The term "Region" as used herein shall mean that part of the United States or any Territory thereof fixed by the Board as a particular Region.

Section 4. The term "Regional Director" as used herein shall mean the agent designated by the Board as Regional Director for a particular Region.

Section 5. The term "Trial Examiner" as used herein shall mean the Board, its member, agent or agency conducting hearing.

Section 6. The term "State" as used herein shall include all States, territories, and possessions of the United States and the District of Columbia.

ARTICLE II.

PROCEDURE UNDER SECTION 10 OF THE ACT FOR THE PREVENTION OF UNFAIR LABOR PRACTICES

Charge

Section 1. A charge that any person has engaged in or is engaging in any unfair labor practice affecting commerce may be made by any person or labor organization.[1] No charge may be withdrawn except with the consent of the Regional Director with whom such charge was filed or of the Board.

Section 2. Except as provided in Section 35 of this Article, such charge shall be filed with the Regional Director for the Region in which the alleged unfair practice has occurred or is occurring.

Section 3. Such charge shall be in writing, the original being signed and sworn to before any notary public or any agent of the Board authorized to administer oaths or acknowledgments. Three additional copies of such charge shall be filed. A blank form for making a charge will be supplied by the Regional Director upon request.

Section 4. Such charge shall contain the following:

(a) The full name and address of the person or labor organization making the charge.

[1] "Person" is defined in the Act as including "one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers."

"Labor organization" is defined in the Act as meaning "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

(b) The full name and address of the person against whom the charge is made (hereinafter referred to as the "respondent").

(c) A clear and concise statement of the facts constituting the alleged unfair labor practice affecting commerce, particularly stating the names of the individuals involved and the time and place of occurrence.

Complaint

Section 5. After a charge has been filed, if it appears to the Regional Director that a proceeding in respect thereto should be instituted, he shall issue and cause to be served upon the respondent and the person or labor organization making the charge (hereinafter referred to as the "parties to the proceeding") a formal complaint in the name of the Board stating the charges and containing a notice of hearing before a Trial Examiner at a place therein fixed and at a time not less than five days after the serving of said complaint.

Section 6. Upon his own motion or upon proper cause shown by any of the parties to the proceeding the Regional Director issuing the complaint may extend the date of such hearing.

Section 7. Any such complaint may be amended by the Trial Examiner or the Board in his or its discretion at any time prior to the issuance of an order based thereon, upon such terms as may be deemed just.

Section 8. If, after the charge has been filed, the Regional Director declines to issue and cause to be served a complaint, the person or labor organization making the charge may obtain a review of such action by filing a request therefor with the Board in Washington, D. C., and filing a copy of such request with the Regional Director. The Re-

gional Director shall thereupon transmit the charge to the Board together with a report stating briefly the reasons for declining to issue the complaint.

Answer

Section 9. The respondent shall have the right, within five days from the service of the complaint, to file an answer thereto. Such answer shall contain a short and simple statement of the facts which constitute the grounds of defense. Respondent shall specifically admit or deny or explain each of the facts alleged in the complaint, unless respondent is without knowledge, in which case respondent shall so state, such statement operating as a denial. Any allegation in the complaint not specifically denied in the answer, unless respondent shall state in the answer that respondent is without knowledge, shall be deemed to be admitted to be true and may be so found by the Board.

Section 10. Such answer shall be filed with the Regional Director issuing the complaint. Such answer shall be in writing, the original being signed and sworn to by the respondent or by a duly authorized agent with appropriate power of attorney affixed, and shall contain the post office address of the respondent. The respondent shall file three additional copies of the answer for the use of the Board. Immediately upon filing his answer the respondent shall serve a copy thereof upon each of the other parties to the proceeding, or file a copy for each such party with the Regional Director, who shall cause such copy to be served upon such party.

Section 11. Upon his own motion or upon proper cause shown by respondent the Regional Director issuing the complaint may by written order extend the time within which the answer shall be filed.

Section 12. In any case where a complaint has been amended the respondent shall have an opportunity to amend his answer within such period as may be fixed by the Trial Examiner or the Board amending the complaint.

Motions

Section 13. All motions made previous to or subsequent to the hearing shall be filed in writing with the Regional Director issuing the complaint, and shall briefly state the order or relief applied for and the grounds for such motion. The moving party shall file an original and three additional copies of all such motions for the use of the Board. Immediately upon the filing of such motion, the moving party shall serve a copy thereof upon each of the other parties to the proceeding, or file a copy for each such party with the Regional Director, who shall cause such copy to be served upon such party. All motions made at the hearing (except motions to intervene, as provided in Section 18 of this Article) shall be stated orally and included in the stenographic report of the hearing.

Section 14. The Trial Examiner, as specified in the notice of hearing, shall rule upon all motions (except as provided in Section 18 of this Article). Rulings on motions, and any orders in connection therewith, if announced at the hearing, shall be stated orally and included in the stenographic report of the hearing; in all other cases they shall be issued in writing and filed with the Regional Director, who shall cause a copy of the same to be served upon each of the parties to the proceeding.

Section 15. All motions, rulings, and orders shall become part of the record in the proceeding and rulings and orders claimed to be substantially prejudicial shall be reviewed by the Board, upon request made for such review,

in conjunction with the Board's consideration of the intermediate report provided for hereinafter in this Article.

Section 16. If any motion in the nature of a motion to dismiss the complaint is granted by the Trial Examiner, the party making the charge may obtain a review of such action by filing a request therefor with the Board in Washington, D. C., and filing a copy of such request with the Regional Director. The Regional Director shall therewith transmit to the Board the charge, complaint, motion, ruling on the motion, and all other relevant papers in the case.

Section 17. No objection to rulings upon motions shall be deemed waived by the filing of an answer or by other participation in the proceedings before the Trial Examiner or the Board.

Intervention

Section 18. Any person or labor organization desiring to intervene in any proceeding shall file a motion in writing with the Regional Director issuing the complaint setting out the grounds upon which such person or organization claims to be interested. The original of such motion shall be signed and sworn to by the person or labor organization filing the motion, who shall file three additional copies of such motion for the use of the Board. Immediately upon filing such motion, the moving party shall serve a copy thereof upon each of the parties to the proceeding, or file a copy for each party with the Regional Director, who shall cause such copy to be served upon such party. The Regional Director shall rule upon all such motions filed prior to the hearing, and the Trial Examiner shall rule upon all such motions filed at the hearing, in the manner set forth in Section 14 of this Article. The Regional Director or the Trial Examiner, as the case may be, may by order permit intervention in person or by counsel to such extent and upon such terms as he shall deem just.

The Regional Director shall cause a copy of said ruling to be served upon each of the parties to the proceeding.

Witnesses and Subpoenas

Section 19. Witnesses shall be examined orally under oath, except that for good and exceptional cause the Trial Examiner may permit their testimony to be taken by deposition under oath. Any such deposition shall be taken in accordance with the procedural requirements for the taking of depositions provided by the law of the State in which the hearing is pending.

Section 20. Subpoenas requiring the attendance and testimony of witnesses and the production of any evidence, including books, records, correspondence, or documents, that relates to any matter under investigation or in question, may be issued by any member of the Board. Application for the issuance of such subpoenas may be filed with the Regional Director by any party to the proceedings. Such applications shall be timely and shall specify the name of the witness and the nature of the facts to be proved by him, and must specify the documents, the production of which is desired, with such particularity as will enable them to be identified for purposes of production.

Section 21. Witnesses summoned before the Trial Examiner shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States. Witness fees and mileage shall be paid by the party at whose instance the witnesses appear and the person taking the deposition shall be paid by the party at whose instance the deposition is taken.

Hearing

Section 22. Hearings for the purpose of taking evidence upon a complaint shall be conducted by the Trial Examiner specified in the notice of hearing, or specially designated by the Board or by the Regional Director. Such hearings shall be public, unless otherwise ordered by the Trial Examiner.

Section 23. It shall be the duty of the Trial Examiner to inquire fully into the facts as to whether the respondent has engaged or is engaging in an unfair labor practice affecting commerce as set forth in the complaint or amended complaint. Counsel for the Board, and the Trial Examiner, shall have power to call, examine and cross-examine witnesses and to introduce into the record documentary or other evidence.

Section 24. Any party to the proceeding shall have the right to appear at such hearing in person, by counsel or otherwise, to call, examine, and cross-examine witnesses, and to introduce into the record documentary or other evidence.

Section 25. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

Section 26. In any such proceeding stipulations of fact may be introduced in evidence with respect to any issue.

Section 27. Objections with respect to the conduct of the hearing, including objections to the introduction of evidence, shall be stated orally, together with the grounds of such objection, and included in the stenographic report of the hearing. No such objection shall be deemed waived by further participation in the proceeding.

Section 28. Any party to the proceeding shall be entitled to a reasonable period at the close of the hearing for

oral argument, which shall not be included in the stenographic report of the hearing unless the Trial Examiner so directs. The parties shall be entitled to file briefs or written statements only with permission of the Trial Examiner.

Section 29. In the discretion of the Trial Examiner, the hearing may be continued from day to day, or adjourned to a later date or to a different place, by announcement thereof at the hearing by the Trial Examiner, or by other appropriate notice.

Intermediate Report and Transmission of Case to the Board

Section 30. After a hearing for the purpose of taking evidence upon a complaint the Trial Examiner shall prepare an intermediate report, which he shall file with the Regional Director issuing the complaint, who will thereafter transmit said report to the Board in Washington, D. C., and cause a copy thereof to be served upon each of the parties to the proceeding. Such report shall contain (a) findings of fact, separately stated and numbered, and (b) recommendations as to what disposition of the case should be made, which may include, if it be found that respondent has engaged or is engaging in the alleged unfair labor practice, a recommendation as to what affirmative action should be taken by respondent to bring about a condition in harmony with the law.

Section 31. Thereafter the Regional Director issuing the complaint shall forward to the Board in Washington, D. C., the charge, complaint, amended complaint, notice of hearing, answer, amended answer, motions, rulings, orders, the stenographic report of the hearing, stipulations, exhibits, documentary evidence, and depositions, all of which, together with the intermediate report and exceptions, shall constitute the record in the case.

Exceptions to the Record
and
Intermediate Report

Section 32. If any party desires to take an exception to the intermediate report or to any other part of the record (including rulings upon all motions or objections) he shall within ten days from the date of service of said report file with the Board at Washington, D. C., four copies of a statement in writing setting forth such exceptions. Immediately upon the filing of such statement of exceptions the party filing the same shall serve a copy thereof upon each of the other parties to the proceeding, or file a copy for each such party with the Board, which shall cause such copy to be served upon such party. Extension of the period within which to file such statement of exceptions may be granted only by the Board.

Section 33. No matter not included in such statement of exceptions may thereafter be objected to before the Board, and failure to file a statement of exceptions shall operate as submission of the case to the Board on the record and the report.

Procedure Before the Board

Section 34. Upon expiration of the period for filing a statement of exceptions, as provided in Section 32 of this Article, the Board may decide the matter forthwith upon the record, or after the filing of briefs or oral argument, or may reopen the record and receive further evidence or require the taking of further evidence before a member of the Board or other agent or agency, or may make other disposition of the case. The board shall notify the parties of the time and place for any such submission of briefs, oral argument or taking of further evidence.

Section 35. Whenever the Board deems it necessary in order to effectuate the purposes of the Act, it may permit a charge that any person has engaged in or is engaging in any unfair labor practice affecting commerce to be filed with it, in Washington, D. C., or may, at any stage of a proceeding instituted in any Region, direct that such proceeding be transferred to and continued before it. The provisions of Sections 3 to 29, inclusive, of this Article shall, insofar as applicable, apply to proceedings before the Board pursuant to this Section, and the powers granted to Regional Directors in such provisions shall, for the purpose of this Section, be reserved to and exercised by the Board.

Section 36. After a hearing for the purpose of taking evidence upon the complaint in any proceeding over which the Board has assumed jurisdiction in accordance with Section 35 of this Article, the Board may

(a) direct that the Trial Examiner prepare an intermediate report, in which case the provisions of Sections 30 to 34, inclusive, of this Article shall insofar as applicable govern subsequent procedure, and the powers granted to Regional Directors in such provisions shall for the purpose of this Section be reserved to and exercised by the Board; or

(b) decide the matter forthwith upon the record, or after the filing of briefs or oral argument; or

(c) reopen the record and receive further evidence before the Board, or a member, agent or agency; or

(d) make other disposition of the case.

The Board shall notify the parties of the time and place of any such submission of briefs, oral argument or taking of further evidence.

Section 37. Whenever the Board deems it necessary in order to effectuate the purposes of the Act, it may, at any

stage of a proceeding instituted in any Region, order that such proceeding be transferred to and continued in any other Region, or may, at any stage of such proceeding, order that such proceeding be transferred to any other Region for purposes of consolidation with a proceeding in such other Region. After the transfer of any proceeding pursuant to this Section, the provisions of Sections 3 to 34, inclusive, of this Article shall apply to such proceeding as if the charge had originally been filed in the Region to which the transfer is made.

ARTICLE III.

PROCEDURE UNDER SECTION 9 (c) OF THE ACT FOR THE INVESTIGATION AND CERTIFICATION OF REPRESENTATIVES

Section 1. A petition requesting the Board to investigate and certify under Section 9 (c) of the Act the name or names of the representatives designated or selected for the purpose of collective bargaining may be filed by any employee or any person or labor organization acting on his behalf (hereinafter referred to as the "petitioner"). Except as provided in Section 11 of this Article, such petition shall be filed with the Regional Director for the Region wherein the contemplated bargaining unit exists and shall be in writing, the original being signed and sworn to before any notary public or any agent of the Board authorized to administer oaths or acknowledgments. Three additional copies of the petition shall be filed. A blank form for filing such a petition will be supplied by the Regional Director upon request.

Section 2. Such petition shall contain the following:

(a) The name and address of the petitioner.

(b) The name and address of the employer or em-

ployers involved, the general nature of their business, and the approximate number of their employees.

(c) A description of the bargaining unit claimed to be appropriate, the approximate number of employees therein, the number and classifications of employees which the representatives on whose behalf the petition is filed claim to represent, the names of any other known individuals or labor organizations who claim to represent any of the employees in the alleged bargaining unit.

(d) A brief statement setting forth the nature of the question or controversy affecting commerce that has arisen concerning representation.

(e) Any other relevant facts.

Section 3. If it appears to the Board that an investigation should be instituted it shall so direct and (except as provided in Section 11 of this Article) shall authorize the Regional Director to undertake such investigation. The Regional Director shall thereupon proceed with such investigation and in connection therewith shall prepare and cause to be served upon the petitioners, upon the employer or employers involved and upon any known individuals or labor organizations purporting to act as representatives for collective bargaining of any employees directly affected by such investigation (all of whom are hereinafter referred to as the "parties to the proceeding"), a notice of a hearing upon the question of representation before a Trial Examiner at a time and place therein fixed. A copy of the petition shall be served with such notice of hearing. The Regional Director shall give public notice of such hearing in such manner as he may deem appropriate.

Section 4. All matters relating to motions, interventions, witnesses and subpoenas shall be governed by the provisions of Sections 13 to 21 inclusive of Article II above.

Section 5. The hearing upon the question of representation shall be conducted by the Trial Examiner specified in the notice of hearing, or specially designated by the Board or by the Regional Director, and shall be open to the public unless otherwise ordered by the Trial Examiner. It shall be the duty of the Trial Examiner to inquire fully into the question of representation. Counsel for the Board, and the Trial Examiner, shall have power to call, examine and cross-examine witnesses and to introduce into the record documentary and other evidence.

Section 6. The introduction of evidence at the hearing and the rights of the parties to the proceedings shall be governed by Sections 24, 25, 26, 27 and 28 of Article II above.

Section 7. Upon the close of the hearing the Regional Director shall forward to the Board in Washington, D. C., the petition, notice of hearing, motions, rulings, orders, the stenographic report of the hearing, stipulations, exhibits, documentary evidence, and depositions, all of which shall constitute the record in the proceeding.

Section 8. The Board shall thereupon proceed, either forthwith upon the record, or after oral argument or the submission of briefs, or after further hearing, as it may determine, to certify to the parties to the proceeding the name or names of the representatives that have been designated or selected, or to direct a secret ballot of the employees in order to complete the investigation, or to make other disposition of the matter.

Section 9. Where the Board determines that a secret ballot should be taken it shall direct such ballot to be conducted by a designated agent or agency in accordance with such terms as it may testify. Upon conclusion of such ballot the agent or agency conducting the ballot shall prepare an intermediate report containing a tally of the ballots, its find-

ings and its recommendations, which it shall cause to be served upon the parties to the proceeding. Within five days thereafter the parties to the proceeding may file with the Regional Director any objection to the ballot or the report. If it appears to the Regional Director that any such objection raises a substantial and material issue with respect to the conduct of the ballot he shall issue and cause to be served upon the parties a notice of hearing on said objections before a Trial Examiner. Said Trial Examiner shall consider such objections raised to said ballot and shall prepare and file with the regional Director a report containing findings and recommendations with respect thereto. Thereafter the Regional Director shall forward to the Board in Washington, D. C., the report of the agency conducting the ballot, the objections filed thereto, the notice of hearing; motions, rulings, orders, the stenographic report of the hearing, stipulations, exhibits, documentary evidence, and depositions, all of which, together with the record previously made, shall constitute the record in the case. The Board shall thereupon proceed as set forth in Section 8 of this Article. If no objection raising a substantial and material issue with respect to the conduct of the ballot is filed to the report of the agency conducting the ballot the Regional Director shall forward directly to the Board in Washington, D. C., said report, which, together with the record previously made, shall constitute the record in the case. The Board shall thereupon proceed as set forth in Section 8 of this Article.

Section 10. Any hearing under Section 9(c) of the Act with respect to the certification fo representatives may be held in conjunction with proceeding on a complaint of an unfair labor practice under Section 10 of the Act.

Section 11. Whenever the Board deems it necessary in order to effectuate the purposes of the Act, it may

(a) permit a petition requesting an investigation

and certification to be filed with it, and may upon the filing of such petition proceed to conduct an investigation under Section 9 (c) of the Act or direct any member, Regional Director or other agent or agency to conduct such an investigation; or

(b) upon its own motion conduct or direct any member, Regional Director or other agent or agency to conduct such an investigation; or

(c) at any stage of a proceeding under Section 9 (c) of the Act instituted in any Region, direct that such proceeding be transferred to and continued before it.

The provisions of this Article shall, insofar as applicable, apply to proceedings conducted pursuant to this Section, and the powers granted to Regional Directors in such provisions shall for the purpose of this Section be reserved to and exercised by the Board or by the member, Regional Director, or other agent or agency director to conduct the investigation.

Section 12. Whenever the Board deems it necessary in order to effectuate the purposes of the Act, it may, at any stage of an investigation being conducted in any Region, direct that such proceeding be transferred to and continued in any other Region, or may, at any stage of such proceeding, order that such proceeding be transferred to any other Region for the purposes of consolidation with a proceeding being conducted in such other Region. After the transfer of any proceeding pursuant to this Section, the provisions of this Article shall apply to such proceeding as if the Board had originally directed that the investigation be conducted in the Region to which the transfer is made.

ARTICLE IV.

DESIGNATION OF REGIONAL DIRECTORS, EXAMINERS AND ATTORNEYS AS AGENTS OF THE BOARD

Section 1. All Regional Directors now or hereafter in the employ of the Board are herewith designated by the Board as its agents:

(a) To prosecute any inquiry necessary to the functions of the Board, in accordance with Section 5 of the Act.

(b) To investigate concerning the representation of employees (including the taking of secret ballots of employees) and conduct hearings in connection with such investigations, in accordance with Section 9 (c) of the Act.

(c) To issue and cause to be served complaints, to amend complaints, and to conduct hearings upon such complaints, in accordance with Section 10 (b) of the Act.

(d) To have access to and the right to copy evidence, to administer oaths and affirmations, to examine witnesses, and to receive evidence, in accordance with Section 11 (1) of the Act.

Section 2. All Examiners now or hereafter in the employ of the Board are herewith designated by the Board as its agents:

(a) To prosecute any inquiry necessary to the functions of the Board, in accordance with Section 5 of the Act.

(b) To investigate concerning the representation of employees (including the taking of secret ballots of employees), in accordance with Section 9 (c) of the Act.

(c) To have access to and the right to copy evidence, and to administer oaths and affirmations, in accordance with Section 11 (1) of the Act.

Section 3. All Attorneys now or hereafter in the employ of the Board are herewith designated by the Board as its agents:

(a) To prosecute any inquiry necessary to the functions of the Board, in accordance with Section 5 of the Act.

(b) To investigate concerning the representation of employees (including the taking of secret ballots of employees) and conduct hearings in connection with such investigation, in accordance with Section 9 (c) of the Act.

(c) To amend complaints issued under Section 10 (b) of the Act and to conduct hearings upon such complaints, in accordance with said Section.

(d) To have access to and the right to copy evidence, to administer oaths and affirmations, to examine witnesses, and to receive evidence, in accordance with Section 11 (1) of the Act.

Section 4. The foregoing designations shall not be construed to limit the power of the Board to make such special designation of agents as may in its discretion be necessary or proper to effectuate the purposes of the Act.

ARTICLE V.

SERVICE OF PAPERS

Section 1. Complaints, orders, and other process and papers of the Board, its member, agent or agency, may be served either personally or by registered mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same setting forth the manner of such service shall be proof of the same, and the return post office receipt or telegraph receipt therefor when registered and mailed or telegraphed as aforesaid shall be proof of service of the same.

Section 2. Service of papers by a party on other parties shall be made by registered mail or in any manner provided for the service of papers in a civil action by the law of the State in which the hearing is pending. When service is made by registered mail, the return post-office receipt shall be proof of service. When service is made in any manner provided by such law, proof of service shall be made in accordance with such law.

ARTICLE VI.

PUBLICATION AND EFFECTIVE DATE

Section 1. These rules and regulations shall become effective upon the signing of the original by the members of the Board, and the filing of said original with the Secretary of the Board, and upon making copies thereof available to the press and placing copies in each Regional Office and in the office of the Board at Washington, D. C., for public inspection.

ARTICLE VII.

CONSTRUCTION OF RULES

Section 1. These rules and revulations shall be liberally construed to effectuate the purposes and provisions of the Act.

ARTICLE VIII.

AMENDMENTS.

Section 1. Any rule or regulation may be any time be amended or rescinded by the Board.

NATIONAL LABOR RELATIONS BOARD

Washington, D. C.

Rule and Regulation authorizing Secretary of the Board to sign certain documents.

By virtue of the authority vested in it by the National Labor Relations Act, approved July 5, 1935, the National Labor Relations Board does hereby authorize the Secretary of the Board, at the direction of the Board in each instance, to sign on behalf of the Board in accordance with the provisions of Section 35, Article II of its Rules and Regulations—Series 1 (signed the 14th day of September, 1935) permissions that a charge may be filed with the Board, orders directing proceeding to be transferred to and continued before the Board, and to sign and issue complaints under Section 10 (b) of the National Labor Relations Act in cases in which the Board shall have authorized the issuance of a complaint, and to sign on behalf of the Board and at its direction in each instance, such orders as may be necessary to be made under Section 9 (a), 9 (b), 9 (c) and 9 (d) of the National Labor Relations Act. This Rule and Regulation shall be effective

upon its publication in the following manner, namely, by the signing of the original by the members of the Board and the filing of said original with the Secretary of the Board, at whose office the original shall be available for public inspection and where copies of it shall be available to the public.

Signed at Washington, D. C., this 16th day of October, 1935.

(Signed) J. WARREN MADDEN, *Chairman,*
(Signed) EDWIN S. SMITH, *Member,*
(Signed) JNO. M. CARMODY, *Member.*

NATIONAL LABOR RELATIONS BOARD
Washington, D. C.

Rule and Regulation authorizing the Secretary of the Board to certify copies of papers and documents.

By virtue of the authority vested in it by the National Labor Relations Act, approved July 5, 1935, the National Labor Relations Board hereby authorizes the Secretary to certify copies of all papers and documents which are a part of any of the files or records of the Board as may be necessary or desirable from time to time. This Rule and Regulation shall be effective upon its publication in the following manner, namely by the signing of the original by the members of the Board and the filing of said original with the Secretary of the Board, at whose office the original shall be available for public inspection and where copies of it shall be available to the public.

Signed at Washington, D. C., this 16th day of October, 1935.

(Signed) J. WARREN MADDEN, *Chairman.*
(Signed) EDWIN S. SMITH, *Member,*
(Signed) JNO. M. CARMODY, *Member.*

Upon the filing of the bill of complaint, the following restraining order and order of notice is entered:

RESTRAINING ORDER AND ORDER OF NOTICE.

April 27, 1936.

BREWSTER, J. Upon the filing of the bill of complaint duly verified, and it appearing that there is danger of irreparable injury to the plaintiff from delay, it is

ORDERED that said A. Howard Myers, individually and as Acting Regional Director for the First Region, National Labor Relations Board, and as the National Labor Relations Board, and Edmund J. Blake, individually and as Regional Attorney for the First Region, National Labor Relations Board, and as the National Labor Relations Board, and Daniel M. Lyons, individually and as Trial Examiner of the National Labor Relations Board designated or to be designated by the National Labor Relations Board and as the National Labor Relations Board, and each of them, and their agents, agencies, assistants, employees and representatives, and any one associated with them, and each of them, and their successors in office, and each of them, and their agents, agencies, assistants, employees and representatives, and any one associated with them, and each of them, be, and they hereby are, retrained from holding or causing to be held, at any time or times, a hearing for the purpose of determing whether or not the said Bethlehem Shipbuilding Corporation, Ltd., Plaintiff herein, has engaged at its Fore River Plant in any so-called unfair labor practices under the National Labor Relations Act, and from having any proceedings or taking any action whatsoever, at any time or times, with respect thereto, pending a hearing upon the prayers of the said plaintiff, and until the further order of the court.

And it is further ORDERED that the said plaintiff give notice to said defendants to appear before this court on Monday, May 4, 1936, at two o'clock in the afternoon, at the Federal Building, Boston, Massachusetts, to show cause why a preliminary injunction should not issue in accordance with the prayers of said bill of complaint, and it is further

ORDERED that notice be given by the said plaintiff by serving copies of this order upon the said defendants forthwith.

By the Court:
JOHN E. GILMAN, JR.,
Deputy Clerk.

MARSHAL'S RETURN ON RESTRAINING ORDER.

UNITED STATES OF AMERICA,
DISTRICT OF MASSACHUSETTS, ss.

Boston, April 27th, 1936.

Pursuant hereunto, I have this day at 11 o'clock and 25 minutes A. M. served the within Restraining Order upon the within named A. Howard Myers, individually and as Acting Regional Director for the First Region, National Labor Relations Board; Edmund J. Blake, individually and as Regional Attorney for First Region, National Labor Relations Board; and Daniel M. Lyons, individually and as Trial Examiner of the National Labor Relations Board, by giving to each of them in hand at Boston, in said District, a true and attested copy of this Restraining Order and Order of Notice.

JOHN J. MURPHY, *U. S. Marshal.*
By DANIEL L. HERLIHY, *Deputy U. S. Marshal.*

Also on the same day, the following subpoena is issued:

SUBPOENA.

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS.

[L. S.]

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To A. Howard Myers, individually and as Acting Regional Director for the First Region, National Labor Relations Board, and as the National Labor Relations Board, Edmund J. Blake, individually and as Regional Attorney for the First Region, National Labor Relations Board, and as the National Labor Relations Board, and Daniel M. Lyons, individually and as Trial Examiner of the National Labor Relations Board designated or to be designated by the National Labor Relations Board and as the National Labor Relations Board, GREETING:

YOU ARE HEREBY COMMANDED that all excuses and delays set aside you be and appear within twenty days after the service of this subpoena at the Clerk's office of the United States District Court for the District of Massachusetts, at Boston, in said District, to anwer unto the ——— bill of complaint of Bethlehem Shipbuilding Corporation, Ltd., a corporation organized and existing under the laws of the State of Delaware, and a citizen of the United States and of the State of Delaware, in said Court exhibited against you. Hereof you are not to fail at your peril, and have you then and there this writ.

WITNESS the Honorable ELISHA H. BREWSTER, United States District Judge at Boston, in said District, this twenty-seventh day of April, A. D. 1936.

JAMES S. ALLEN, *Clerk,*
By EDITH G. ROLLINS, *Deputy Clerk.*

MEMORANDUM.

The Defendants in this case are required to file their answers or other defense in the Clerk's office of said Court, on or before the twentieth day after service of this writ, excluding the day thereof; otherwise the Bill may be taken *pro confesso.*

Due return of service on said subpoena is made by the marshal and is as follows:

OFFICER'S RETURN OF SERVICE OF SUBPOENA.

UNITED STATES OF AMERICA,

DISTRICT OF MASSACHUSETTS, ss:

I hereby certify and return, that on the 27th day of April, 1936, I received the within Subpoena. And thereafter on the same day I served the within named A. Howard Myers, individually and as Acting Regional Director for the First Region, Natl. Labor Relations Board; Edmund J. Blake, individually and as Regional Attorney for First Region, Natl. Labor Relations Board; and Daniel M. Lyons, individually and as Trial Examiner of the National Labor Relations Board, by giving to each of them in hand at Boston, in said District, a true and attested copy of this Subpoena.

JOHN J. MURPHY, *United States Marshal.*
By DANIEL L. HERLIHY,
Deputy United States Marshal.

At the same term, to wit, May 1, 1936, the following defendant's motion to dismiss is filed:

DEFENDANT'S MOTION TO DISMISS.

[FILED MAY 1, 1936.]

Now come the defendants, A. Howard Myers, individually and as Acting Regional Director for the First Region,

Edmund J. Blake, individually and as Regional Attorney for the First Region, and Daniel M. Lyons, individually and as Trial Examiner of the National Labor Relations Board designated or to be designated by the National Labor Relations board, and move the Court to dismiss the bill of complaint herein and as reasons therefor assign the following:

1. The bill of complaint on its face fails to state a cause of action entitling the plaintiff to the relief prayed for or any relief in equity against the said defendants.

2. The bill of complaint on its face shows that the plaintiff is not threatened with or in danger of suffering any great irreparable or immediate injury cognizable in equity by reason of any matter set forth in the said Bill of Complaint.

3. It appears on the face of the bill of complaint that this case does not really and substantially involve a dispute or controversy properly within the jurisdiction of this Court in that the amount or value of the subject matter in dispute as appears in the bill of complaint does not exceed $3,000 exclusive of interests and costs.

4. It appears upon the face of the bill of complaint that no real substantial or colorable dispute or controversy involving the Constitution and laws of the United States is involved.

5. It appears upon the face of the bill of complaint that the plaintiff by following the procedure set forth in the National Labor Relations Act would not be deprived of property without due process of law and would not be denied the equal protection of the law.

6. The said bill of complaint on its face fails to state a case or controversy of a justiciable question for the determination of this Honorable Court within the meaning of Article III, Sections 1 and 2 of the Constitution of the United States.

7. The said bill of complaint on its face fails to show an "actual controversy" within the meaning of the Federal Declaratory Judgment Act, Section 274-D of the Judicial Code (Section 400, Title 28, U. S. Code).

8. It appears on the face of the bill of complaint that granting the relief prayed would constitute an invasion of the powers of the legislative and executive branches of the Federal government and is further a usurpation of the authority exclusively vested in the Circuit Court of Appeals by the National Labor Relations Act.

9. It appears upon the face of the bill of complaint that the plaintiff has a plain, adequate and complete remedy at law under the provisions of the National Labor Relations Act with respect to any rights growing out of the matters alleged in the bill of complaint.

10. It appears on the face of the bill of complaint that plaintiff has failed to resort to any of its administrative remedies and has failed to exhaust its said remedies which afford a plain, adequate and complete remedy with respect to any rights of the plaintiff involved in this case.

11. It appears on the face of the bill of complaint that the only power of the defendant A. Howard Myers is to cause a hearing to be conducted, with no enforceable obligation on the part of the plaintiff involving any fine or penalty whatsoever to comply therewith unless and until (a) a hearing has been conducted by Daniel M. Lyons or other Trial Examiner designated by the National Labor Relations Board; (b) the Trial Examiner files an intermediate report with the National Labor Relations Board containing findings and recommendations in which findings and recommendations the Trial Examiner determines (1) the Board has jurisdiction in the premises and (2) the plaintiff has committed unfair labor practices affecting commerce within the meaning of Section 8

of said Act; (c) the matter has been reviewed by the National Labor Relations Board; (d) a final decision is subsequently made by the National Labor Relations Board, adverse to plaintiff, and after a determination that the Board has jurisdiction in the premises and after a determination that the plaintiff has committed unfair labor practices affecting commerce; (e) upon the said decision an order is issued by the National Labor Relations Board requiring the plaintiff to cease and desist and end its unfair labor practices as found; (f) plaintiff refuses to comply with the Board's order; (g) an application by the National Labor Relations Board to the appropriate Circuit Court of Appeals of the United States is made under the provisions of Section 10 of the National Labor Relations Act to enforce the said order; (h) the said Court of Appeals reviews the case, sustains the order of the Board or some part of it and issues its own order; (i) the order of the Circuit Court of Appeals is violated by the plaintiff; (j) said plaintiff is cited for contempt of court; and (k) said plaintiff is found by the Court of Appeals to be guilty of contempt of court.

12. It appears on the face of the bill of complaint that it is beyond the power of the defendants under the National Labor Relations Act to attempt to prosecute or to prosecute in any respect involving any fine, forfeiture or penalty and there is accordingly no occasion whatever to enjoin the defendants from doing any matter or thing in that respect, all such prosecutions which might be made under the National Labor Relations Act being a matter for determination by the Attorney General of the United States or the Department of Justice or his or its officers or agents, no one of whom is made a party defendants in this cause.

13. The bill of complaint of the plaintiff fails to show that the said defendants have issued or have immediately threatened to issue or have exercised any power or have im-

mediately threatened to exercise any power or authority to issue any subpoenas requiring or compelling the attendance and testimony of witnesses and the production of any books, papers, records or other documents or to apply to the appropriate District Court of the United States for an order enforcing compliance with any subpoenas, pursuant to Section 11, subdivision (2) of the National Labor Relations Act.

14. Said plaintiff fails to allege that said moving defendants have claimed, exercised or threatened to exercise any power to prosecute said plaintiff criminally under Section 12 of the said Act or that the said moving defendants have recommended or requested or threatened to recommend or request that the Attorney General of the United States or the Department of Justice or his or its agents institute a prosecution under Section 12 of the said Act, or that said enforcement authorities have threatened to institute any such prosecution and said plaintiff fails further to allege wherein opportunity to the plaintiff to defend in any such prosecutions if any were brought or threatened would not afford a plain, adequate, complete and speedy remedy for the review and redress of any matter of law and fact raised in said complaint in connection with the alleged fear of prosecution under said Section 12 of the Act.

15. The National Labor Relations Act is valid and constitutional and the purpose of the proceedings instituted in which the plaintiff is a party under said Act is the determination in accordance with the provisions of the said Act of the question of whether or not any unfair labor practices affecting commerce as alleged in the Complaint heretofore issued by the National Labor Relations Board have been engaged in by the plaintiff, the only provisions of law for the determination of the said question being the provisions of the National Labor Relations Act and the method thereby prescribed being exclusive.

16. The said plaintiff fails to present a case or controversy for the determination of this Honorable Court within the meaning of Article III, Sections 1 and 2 of the United States Constitution.

17. Large public interests are concerned herein and the issuance of an injunction will seriously embarass the accomplishment of important governmental ends and will interfere with an agency of the government in the performance of its duties.

WHEREFORE, the defendants respectfully move this Honorable Court that the Bill of Complaint be dismissed and that they go hence with their costs.

ROBERT B. WATTS,
Attorney for Defendants,
A. Howard Myers, individually and as Acting Regional Director for the First Region, Edmund J. Blake, individually and as Regional Attorney for the First Region, and Daniel M. Lyons, individually and as Trial Examiner of the National Labor Relations Board designated or to be designated by the National Labor Relations Board.

At the same term, to wit, May 4, 1936, the following special appearance is filed:

SPECIAL APPEARANCE OF ROBERT B. WATTS.

[FILED MAY 4, 1936.]

To the Clerk of the United States District Court for the District om Massachusetts:

You will please enter my special appearance as Attorney for A. Howard Myers, "National Labor Relations Board, and as the National Labor Relations Board," Edmund J.

Blake, "National Labor Relations Board, and as the National Labor Relations Board," and Daniel M. Lyons, "as the National Labor Relations Board," so designated, and defendants in the above entitled cause.

Said special appearance is made for the sole purpose of objecting to the jurisdiction of this Court over said denominated defendants in the said above-named proceeding.

ROBERT B. WATTS,
Attorney appearing specially for A. Howard Myers, "National Labor Relations Board, and as the National Labor Relations Board," Edmund J. Blake, "National Labor Relations Board, and as the National Labor Relations Board," and Daniel M. Lyons, "as the National Labor Relations Board."

On the said 4th day of May, A. D. 1936, the following return of A. Howard Myers et al. to the rule to show cause is filed:

RETURN OF A. HOWARD MYERS ET AL. TO THE RULE TO SHOW CAUSE.

[Filed May 4, 1936.]

To the Honorable, the Judges of the District Court of the United States for the District of Massachusetts:

Now come the defendants, A. Howard Myers, individually and as Acting Regional Director for the First Region, Edmund J. Blake, individually and as Regional Attorney for the First Region, and Daniel M. Lyons, individually and as Trial Examiner of the National Labor Relations Board des-

ignated or to be designated by the National Labor Relations Board, and for their return to the rule to show cause in the within action, state as follows:

1. Defendants admit each and every allegation contained in paragraph (1) of the bill of complaint.

2. Defendants admit each and every allegation contained in paragraph (2) of the bill of complaint, except that, for lack of knowledge, defendants deny that J. Warren Madden is a citizen of the State of Pennsylvania, that John M. Carmody is a citizen of the State of New York, and that Edwin S. Smith is a citizen of the Commonwealth of Massachusetts.

3. Defendants admit each and every allegation contained in paragraph (3) of the bill of complaint except that they deny that A. Howard Myers is a citizen of the Commonwealth of Massachusetts and except that they deny that A. Howard Myers is charged with the duty of prosecuting inquiries and investigations under the Act and doing other things as provided by Article IV of the Rules and Regulations of the National Labor Relations Board, and except that they deny that A. Howard Myers is now acting as the National Labor Relations Board in the Commonwealth of Massachusetts.

Further with respect to paragraph (3) of the Bill of Complaint, defendants aver that the powers and duties of A. Howard Myers as Acting Regional Director for the First Region are accurately and completely set forth in said Rules and Regulations of the National Labor Relations Board.

4. Defendants admit each and every allegation contained in paragraph (4) of the Bill of Complaint except that they deny that Edmund J. Blake is charged with the duty of prosecuting inquiries and investigations under the Act and doing other things as provided by Article IV of the Rules and Regulations of the National Labor Relations Act, and except that they deny that Edmund J. Blake is acting as the Na-

tional Labor Relations Board in the Commonwealth of Massachusetts.

Further with respect to paragraph (4) of the bill of complaint, defendants aver that the powers and duties of Edmund J. Blake as Regional Attorney for the First Region are accurately and completely set forth in said Rules and Regulations of the National Labor Relations Board.

5. Defendants deny each and every allegation contained in paragraph (5) of the Bill of Complaint except that they admit that Daniel M. Lyons is a citizen of the United States and was appointed by the National Labor Relations Board to act as Trial Examiner in the proceedings which were scheduled to be heard on April 27, 1936.

Further with respect to paragraph (5) of the Bill of Complaint, defendants aver that the powers and duties of a Trial Examiner appointed by the National Labor Relations Board are accurately and completely set forth in said Rules and Regulations promulgated by said National Labor Relations Board.

6. For lack of knowledge, defendants deny each and every allegation set forth in paragraph (6) of the Bill of Complaint except, upon information and belief, defendants admit that plaintiff at all times material to this case has been engaged in the operation of a ship yard designed and used for the building of merchant and naval vessels, located at Quincy and Braintree, Massachusetts, known as the Fore River plant, and upon information and belief, defendants admit that its ship yard contains the necessary equipment for the conduct of its business.

7. For lack of knowledge, defendants deny each and every allegation contained in paragraph (7) of the Bill of Complaint.

8. For lack of knowledge, defendants deny each and

every allegation contained in paragraph (8) of the Bill of Complaint.

9. Defendants admit each and every allegation contained in paragraph (9) of the Bill of Complaint.

10. Defendants admit each and every allegation contained in paragraph (10) of the Bill of Complaint except that defendants deny that in signing the complaint referred to in said paragraph (10) A. Howard Myers was acting as the National Labor Relations Board.

11. Defendants deny each and every allegation contained in paragraph (11) of the Bill of Complaint except that, for lack of knowledge, defendants deny that the National Labor Relations Board will issue a cease and desist order, and for lack of knowledge, defendants deny that the National Labor Relations Board will petition a United States Circuit Court of Appeals under Section 10 (e) of the National Labor Relations Act, and except that defendants admit that the hearing scheduled to be held on April 27th was the first hearing scheduled to be held on the Board's complaint, and except that defendants admit that the hearing was scheduled on the allegations of the Board's complaint for the purpose of determining whether or not plaintiff had committed unfair labor practices affecting commerce within the meaning of the National Labor Relations Act.

Further with respect to paragraph (11) of the Bill of Complaint, defendants aver that the procedure thus far taken under the National Labor Relations Act has been in accordance with said Act and the Rules and Regulations promulgated by the National Labor Relations Board.

12. Defendants deny each and every allegation contained in paragraph (12) of the Bill of Complaint.

13. Defendants deny each and every allegation contained in paragraph (13) of the Bill of Complaint except that, for

lack of knowledge, defendants deny that plaintiff by appearing at a hearing would incur expense for counsel fees, witness fees and for travel and other expenses, and except that, for lack of knowledge, defendants deny that a further hearing will be held in Washington, D. C., and except that, for lack of knowledge, defendants deny that the National Labor Relations Board has threatened to require many employees of the plaintiff to appear at the hearing before a Trial Examiner as witnesses.

Further with respect to paragraph (13) of the Bill of Complaint, defendants aver that they have no power to issue subpoenas requiring the attendance of witnesses and the production of evidence, and that the power to issue subpoenas is within the sole province of the members of the National Labor Relations Board, which members, upon information and belief, have not issued any subpoenas and have not threatened to issue any subpoenas, and defendants further aver that even the members of the National Labor Relations Board have no power to compel obedience to subpoenas issued and that the sole province to compel obedience to subpoenas issued by members of the National Labor Relations Board is within the appropriate United States District Court. Defendants further aver that no proceeding has been commenced or threatened in the appropriate United States District Court to compel enforcement of subpoenas, and they further aver that in the event such a proceeding before a United States District Court should take place, plaintiff would at that time have ample opportunity to defend. Defendants further aver that the sole purpose of the hearing scheduled to be held was to aid the National Labor Relations Board in determining whether or not plaintiff had committed unfair labor practices affecting commerce. Neither the defendants nor the National Labor Relations Board are interested in matters beyond the allegations of the Board's complaint.

14. Defendants deny each and every allegation contained in paragraph (14) of the Bill of Complaint.

Further with respect to paragraph (14) of the Bill of Complaint, defendants aver that Section 12 of the National Labor Relations Act is wholly immaterial to and has no bearing on the issues before this Court. Section 12 of the National Labor Relations Act is a criminal provision for the protection of the members of the National Labor Relations Board and its agents and employees in the performance of their duties. It has not been alleged that plaintiff has violated Section 12 of of said Act, and the defendants do not anticipate that plaintiff will violate Section 12. The defendants and the National Labor Relations Board have no powers with respect to Section 12 of said Act. A prosecution under Section 12 is within the sole province of the appropriate United States Attorneys, no one of whom has commenced any prosecution under said Act and no one of whom has been requested to commence any such prosecution. Defendants further aver that Section 12 of the National Labor Relations Act neither compels the attendance of plaintiff's officers and employees at a hearing before the Board nor does it compel the disclosure of confidential information.

15. Defendants deny each and every allegation contained in paragraph (15) of the Bill of Complaint, and defendants aver that the proceeding before the National Labor Relations Board involved herein is limited to the alleged unfair labor practices contained in subsections (1) and (2) of Section 8 of the National Labor Relations Act. The hearing was scheduled to be held for the purpose of determining whether or not plaintiff has interfered with, restrained or coerced its employees in the exercise of the rights guaranteed in Section 7 and to determine whether or not plaintiff has denominated or interfered with the formation or administration of a labor organization or contributed financial or other support to such a labor organization.

16. Defendants, upon information and belief, admit that there was a proceeding before the old National Labor Relations Board involving Public Resolution No. 44 and Section 7 (a) of the National Industrial Recovery Act, in which proceeding the Bethlehem Shipbuilding Corporation was a party as was local No. 5 and the Employees Representation Plan. Defendants further, upon information and belief, admit that hearings were conducted at Boston over a period of about eight days and that the matter was argued before the old National Labor Relations Board on or about December 18, 1934. Defendants, upon information and belief, admit that Edwin S. Smith was a member of the old National Labor Relations Board and that the old National Labor Relations Board held that an election was not in the public interest and that the plaintiff had not violated Section 7 (a) of the National Industrial Recovery Act.

For lack of knowledge, defendants deny each and every other allegation contained in paragraph (16) of the Bill of Complaint. Further with respect to paragraph (16) of the Bill of Complaint, defendants aver that the procedure referred to therein was conducted by the old National Labor Relations Board which no longer is in existence, pursuant to the terms of the National Industrial Recovery Act and Public Resolution No. 44, neither of which is involved in a proceeding at issue before this Court. Defendants further aver that the allegations contained in said paragraph (16) of the Bill of Complaint are wholly immaterial to and have no bearing upon the issues before this Court.

17. For lack of knowledge, defendants deny each and every allegation contained in paragraph (17) of the Bill of Complaint except that they admit, on information and belief, that certain officials and employees of the plaintiff participated in said hearing.

Further with respect to paragraph (17) of the Bill of

Complaint, defendants aver that the allegations contained in said paragraph are wholly immaterial to and have no bearing on the issues before this Court.

18. For lack of knowledge, defendants deny each and every allegation contained in paragraph (18) of the Bill of Complaint except that they admit that the provisions of Section 7 of the National Labor Relations Act are to a degree similar to the provisions of Section 7 (a) of the National Industrial Recovery Act and except that they admit that the records of the old National Labor Relations Board are now the records of the National Labor Relations Board, and except that they admit that the National Labor Relations Board has issued a complaint against plaintiff and scheduled a hearing to be held on April 27, 1936, and except that defendants deny that plaintiff will suffer imminent and irreparable damage and injury, and except that defendants deny knowledge of facts in connection with the Employees Representation Plan and the policies and acts of the plaintiff.

Further with respect to paragraph (18) of the Bill of Complaint, defendants aver that the provisions of the National Labor Relations Act are different from the provisions of the National Industrial Recovery Act and Public Resolution No. 44, and defendants further aver that the allegations in said paragraph (18) of the Bill of Complaint with respect to a procedure conducted by the old National Labor Relations Board in 1934 under the National Industrial Recovery Act and Public Resolution No. 44 have no bearing on and are not material to the issues before this Court.

19. Defendants deny each and every allegation contained in paragraph (19) of the Bill of Complaint except that, for lack of knowledge, defendants deny the allegations contained in said paragraph with respect to the aim of Local No. 5.

Further with respect to paragraph (19) of the Bill of Complaint, defendants aver that the purpose of the proceed-

ing scheduled before the National Labor Relations Board is to determine whether or not plaintiff has committed unfair labor practices affecting commerce within the meaning of the National Labor Relations Act. Defendants further aver that the proceeding has nothing to do with the discouragement of pleasant and harmonious relations with plaintiff's employees and further aver that the continuation of a proceeding pursuant to the terms of the National Labor Relations Act will promote pleasant, friendly and harmonious relations between plaintiff and its employees and between employers and employees in general. Defendants further aver that the proceeding before the National Labor Relations Board has nothing to do with the efficiency of plaintiff's employees and that the tendency of the continuance of such proceeding would increase the efficiency of the employees. Defendants further aver that the proceeding scheduled to be held before the National Labor Relations Board is in accordance with law. Defendants further aver that the allegations contained in said paragraph (19) with respect to plaintiff's labor relations are wholly immaterial to and have no bearing on the issues before this Court. Defendants further aver that plaintiff will suffer as much expense by the continuance of this injunction proceeding as will be suffered by plaintiff through the continuance of the proceeding before the National Labor Relations Board. Defendants further aver that plaintiff has failed to allege any damages cognizable in equity and that plaintiff has adequate remedy.

20. For lack of knowledge, defendants deny each and every allegation contained in paragraph (20) of the Bill of Complaint and aver that the allegations contained therein are wholly immaterial to and have no bearing on the issues before this Court.

21. For lack of knowledge, defendants deny each and every allegation contained in paragraph (21) of the Bill

of Complaint and aver that the allegations contained therein are wholly immaterial to and have no bearing on the issues before this Court.

22. For lack of knowledge, defendants deny each and every allegation contained in paragraph (22) of the Bill of Complaint and aver that the allegations contained therein are wholly immaterial to and have no bearing on the issues before this Court.

23. Defendants deny each and every allegation contained in paragraph (23) of the Bill of Complaint.

24. Defendants deny each and every allegation contained in paragraph (24) of the Bill of Complaint.

25. Defendants deny each and every allegation contained in paragraph (25) of the Bill of Complaint.

26. Defendants deny each and every allegation contained in paragraph (26) of the Bill of Complaint.

27. Defendants deny each and every allegation contained in paragraph (27) of the Bill of Complaint.

28. Defendants deny each and every allegation contained in paragraph (28) of the Bill of Complaint.

Defendants further aver as follows:

29. The National Labor Relations Act is valid and constitutional and is the only law for the determination of the questions involved in the proceedings scheduled, before the National Labor Relations Board, and the remedies provided by the National Labor Relations Act are exclusive.

30. The plaintiff is engaged in interstate commerce and is dependent upon interstate commerce for its existence, but whether or not plaintiff is engaged in interstate commerce and whether or not plaintiff has committed unfair labor practices affecting commerce must be determined in accord-

ance with the provisions of the National Labor Relations Act and have no bearing on and are not material to the issues before this Court.

31. The hearing which was scheduled to be held on April 27th, and which undoubtedly will be held in the future, does not involve any threat, danger or possibility of harm or injury to the plaintiff and is scheduled or will be scheduled in accordance with the terms of the National Labor Relations Act and the Rules and Regulations promulgated by the National Labor Relations Board, pursuant to said Act.

32. The defendants have no power to make any order affecting the plaintiff. The power to make orders under the National Labor Relafions Act is within the sole province of the National Labor Relations Board.

33. The issuance of any order by the National Labor Relations Board against the plaintiff is neither imminent nor certain as the same is a matter of future determination; no order can be made by the National Labor Relations Board in any event until after a hearing is held with a full opportunity for the plaintiff to offer testimony, present evidence, examine and cross-examine witnesses and to raise any and all objecttions to the constitutionality of the National Labor Relations Act and the jurisdiction of the National Labor Relations Board; and defendants further aver that the plaintiff may thereafter, depending upon the evidence in the hearing based upon Section 10 of the Act, do any of the following: (a) dismiss the complaint for lack of jurisdiction, in that the unfair labor practices charged therein may not be shown to affect commerce; (b) dismiss the complaint for lack of proof of the commission of or engaging in by the plaintiff of any of the unfair labor practices charged therein, and (c) dismiss the complaint in part and sustain the same with respect to the allegations which have been established and thereafter

issue a final decision and a cease and desist order with respect to the unfair labor practices which have been established.

34. The issuance of a cease and desist order in the hearing based upon Section 10 of the Act, by the National Labor Relations Board to the plaintiff involves no restraint or legal compulsion upon the plaintiff, no fine, penalty or forfeiture is incurred by the plaintiff for non-compliance or disobedience of the same and no order of the Board is enforceable as such under the Act. Should the Board issue such order against the plaintiff, the same would not become enforceable unless and until: (a) the Board applies to the appropriate Circuit Court of Appeals under Section 10(e) of the National Labor Relations Act for an order directing compliance by the plaintiff with such order or the plaintiff petitions the Circuit Court of Appeals under Section 10(f) of the Act for a review of the Board's order, either of the foregoing procedures being based upon the entire record of the proceedings before the Board with full opportunity to plaintiff for a review of said order upon the merits and for determination of all of the constitutional and jurisdictional questions; (b) the Circuit Court of Appeals reviews the case, sustains the order or some part thereof and issues its own final order. The enforceability of any order which may thereafter be made by the Circuit Court of Appeals would arise not by virtue of any of the provisions of the Act but by virtue of the powers inherent in the Circuit Court of Appeals as a duly constituted court of law to enforce its own orders.

35. The foregoing procedure under the National Labor Relations Act affords the plaintiff a full, adequate, complete and exclusive remedy. No fine, forfeitures, restraints or penalties of any kind are involved and no order of the Board can be enforced unless and until the Circuit Court of Appeals has finally heard and determined all issues and has rendered

its own final order and no order is rendered by the Circuit Court of Appeals until the plaintiff has been afforded a full opportunity to be heard by said court on said questions constitutional, jurisdictional and otherwise. The Circuit Court of Appeals will not in any event issue an order directing compliance with the National Labor Relation Board's order unless and until it determines (a) that the National Labor Relations Act is constitutional; (b) that the Act is applicable to the plaintiff; and (c) that the evidence supports the findings and decisions of the Board as to the merits.

Any order directing compliance thereafter issued by the Circuit Court of Appeals would be based upon an adjudication by a duly established Federal court on the very questions which the plaintiff seeks to raise prematurely and collaterally by this action in equity.

36. The plaintiff has failed to resort to any of its remedies and has failed to exhaust its administrative remedies which afford a plain, adequate and complete remedy with respect to any rights of the plaintiff involved in this proceeding.

37. The said Bill of Complaint fails to present a case or controversy for determination of this Honorable Court within the meaning of Article III, Sections (1) and (2) of the United States Constitution.

38. There are no allegations in the Bill of Complaint sufficient to show that the plaintiff is threatened with or is in danger of suffering any great, irreparable or immediate injury cognizable in equity by reason of any of the matters set forth in the Bill of Complaint.

39. The plaintiff has a plain, adequate and complete remedy under the provisions of the National Labor Relations Act with respect to the rights growing out of matters and things alleged in the bill of Complaint.

40. It is beyond the power of the defendants or the Board to prosecute or attempt to prosecute the plaintiff in any respect involving any fine, penalty or forfeiture.

41. The said Bill of Complaint fails to show an actual controversy within the meaning of the Federal Declaratory Judgment Act, Section 274-D of the Judicial Code (Section 400, Title 28, U. S. Code).

42. Large public interests are concerned herein and the issuance of an injunction will seriously embarrass the accomplishment of important governmental ends and will interfere with an agency of the Government in the performance of its duties.

43. The granting of the relief prayed for herein would constitute an invasion of the powers of the legislative and executive branches of the Federal Government and further a usurpation of the authority vested exclusively in the Circuit Court of Appeals by the National Labor Relations Act.

WHEREFORE, defendants respectfully move this Honorable Court that the temporary restraining order be dissolved, that the application for a preliminary injunction be denied, and that the petition for a declaration that the National Labor Relations Act is unconstitutional, void and unenforceable be denied, and the order to show cause be vacated with costs.

A. HOWARD MYERS.
Individually and as Acting Regional Director for the First Region.

EDMUND J. BLAKE.
Individually and as Regional Attorney for the First Region.

ROBERT B. WATTS

County of Suffolk,
Commonwealth of Massachusetts, ss.:

A. Howard Myers, individually and as Acting Regional Director for the First Region, and Edmund J. Blake, individually and as Regional Attorney for the First Region, being duly sworn, depose and say that they are defendants in the within cause of action, that they have read the foregoing return and know the contents thereof and that the same is true, except for those matters alleged therein on information and belief, and as to those matters, they believe them to be true.

A. HOWARD MYERS.
EDMUND J. BLAKE,

Subscribed and sworn to before me
this 4th day of May, 1936.
HENRY S. CURTIS, (L. S.)
Notary Public.

County of Suffolk,
Commonwealth of Massachusetts, ss.:

Robert B. Watts, being duly sworn, deposes and says that he is the attorney for Daniel M. Lyons, individually and as Trial Examiner of the National Labor Relations Board designated or to be designated by the National Labor Relations Board, that he has read the foregoing return, knows the contents thereof and that the same is true to the best of his knowledge, information and belief, and that he makes this affidavit because Daniel M. Lyons is without the jurisdiction of this Court and is unavailable to do so himself.

ROBERT B. WATTS.

Subscribed and sworn to before
me this 4th day of May, 1936.
EDMUND J. BLAKE, (L. S.)
Notary Public.
My commission expires Nov. 27, 1942.

Also on the said 4th day of May, A.D. 1936, the following motion to quash subpoena was filed by A. Howard Myers et al.:

MOTION TO QUASH SUBPOENA

[Filed May 4, 1936.]

Now come A. Howard Myers, "National Labor Relations Board, and as the National Labor Relations Board," Edmund J. Blake, "National Labor Relations Board, and as the National Labor Relations Board," and Daniel M. Lyons, "as the National Labor Relations Board," denominated defendants herein, and named in the subpoena and bill of complaint as such defendants, and appearing specially by Robert B. Watts, their Attorney, and limiting their appearance herein specially and solely for the purpose of this motion, and for no other purpose whatsoever, move the Court to quash the subpoena heretofore issued by the Court herein, and as reasons therefor assign the following:

1. A. Howard Myers, as affirmatively appears in the bill of complaint, heretofore filed, is not a member of the National Labor Relations Board and is not the National Labor Relations Board.

2. Edmund J. Blake, as affirmatively appears in the bill of complaint, heretofore filed, is not a member of the National Labor Relations Board and is not the National Labor Relations Board.

3. Daniel M. Lyons, as affirmatively appears in the bill of complaint, heretofore filed, is not a member of the National Labor Relations Board and is not the National Labor Relations Board.

4. The said "National Labor Relations Board," as affirmatively appears in the bill of complaint filed by the plaintiff herein, is, and at all times therein mentioned was, a duly

authorized and existing Board of the United States of America, and an agency thereof under the provisions of the National Labor Relations Act, and as such may not be sued at law or in equity as a party defendant or at all without an act of Congress authorizing such suit or proceedings; that no such act of Congress is pleaded in the plaintiff's bill of complaint, nor has such act of Congress been passed.

5. The "National Labor Relations Board" was not at the time of the filing of this Bill or at any time thereafter, an inhabitant of the District of Massachusetts nor were any of its members inhabitants of the District of Massachusetts at the time of filing the Bill or at any time thereafter, and the "National Labor Relations Board" and its members have its and their official residences in the City of Washington, District of Columbia, as affirmatively appears by the bill of complant herein filed.

ROBERT B. WATTS,
Attorney appearing specially for A. Howard Myers, "National Labor Relations Board, and as the National Labor Relations Board," Edmund J. Blake, "National Labor Relations Board, and as the National Labor Relations Board," and Daniel M. Lyons, "as the National Labor Relations Board."

Also on the said 4th day of May, 1936, the Honorable Elisha H. Brewster, District Judge, sitting, this cause coming on to be heard on the aforementioned motion to dismiss, on the restraining order, and the prayer for preliminary injunction, it is ordered that affidavits be filed within one

week and the following order continuing restraining order to May 19, 1936, is entered:

ORDER CONTINUING RESTRAINING ORDER TO MAY 19, 1936.

[May 4, 1936.]

BREWSTER, J. This cause having come on for hearing upon a motion by the defendants to dismiss the verified bill of complaint herein and a rule to show cause issued herein on the 27th day of April, 1936, when upon consideration of the verified bill of complaint for restraining order and injunction and petition for declaratory judgment filed herein the 27th day of April, 1936, it appeared to this Court from said verified bill of complaint and petition that the National Labor Relations Board had issued a complaint against the plaintiff and set a hearing thereon to be held at 10 o'clock A.M. on April 27, 1936, for the purpose of determining whether or not the plaintiff had engaged at its Fore River Plant in certain so-called unfair labor practices alleged in said complaint and that there was danger that the holding of said hearing, the continuation thereof and the holding and continuation of any further proceedings thereon or in connection therewith and the taking or carrying out of any action in connection therewith would cause the plaintiff damages and injuries by injuring the good will and reputation of the plaintiff with its employees and the public and causing it to incur the odium and ill will of such employees and the public and to be in disrepute therewith, by involving the public disclosure of its private books, records, documents and trade secrets, by causing the plaintiff to incur large out-of-pocket expenses in order to resist the charges brought against it by the National Labor Relations Board in the aforesaid complaint the recovery or reimbursement of which would be very doubtful if not impossible, by interrupting and

disrupting the operation of the Fore River Plant of the plaintiff through the attendance of officials and employees of the plaintiff as witnesses at said hearing, by infringing and damaging the pleasant, friendly and harmonious relations between the plaintiff and its employees and impeding the plaintiff in the enjoyment of the benefits thereof, by impeding the exercise by the plaintiff of its right freely and independently to bargain with its employees with respect to rates of pay, wages, hours of employment and other conditions of employment and, in general, by disturbing conditions at the Fore River Plant of the plaintiff and by impeding the plaintiff in carrying on its regular business at said Plant, and it appeared to this Court that such damages and injuries would be irreparable, because such damages and injuries would not be wholly ascertainable in a pecuniary value and the plaintiff would be unable to prove the full and exact amount thereof in any court of law, and it further having appeared to this Court that there was not sufficient time between the appointment by the National Labor Relations Board of one of the defendants herein as Trial Examiner to conduct said hearing and the hour set for the beginning of said hearing to give notice to the defendants of the application of the plaintiff for a restraining order herein, it was on the 27th day of April, 1936, by this Court

ORDERED that said A. Howard Myers, individually and as Acting Regional Director for the First Region, National Labor Relations Board, and as the National Labor Relations Board, and Edmund J. Blake, individually and as Regional Attorney for the First Region, National Labor Relations Board, and as the National Labor Relations Board, and Daniel M. Lyons, individually and as Trial Examiner of the National Labor Relations Board designated or to be designated by the National Labor Relations Board and as the Na-

tional Labor Relations Board, and each of them, and their agents, agencies, assistants, employees and representatives, and any one associated with them, and each of them, and their successors in office, and each of them, and their agents, agencies, assistants, employees and representatives, and any one associated with them, and each of them, be, and they hereby are, restrained from holding or causing to be held at any time or times, a hearing for the purpose of determining whether or not the said Bethlehem Shipbuilding Corporation, Ltd., Plaintiff herein, has engaged at its Fore River Plant in any so-called unfair labor practices under the National Labor Relations Act, and from having any proceedings or taking any action whatsoever, at any time or times, with respect thereto, pending a hearing upon the prayers of the said plaintiff, and until the further order of the Court.

And it appearing to this Court that the situation existing on April 27, 1936, as hereinbefore stated has not changed, and that a suit has been commenced in this Court on this 4th day of May entitled "Charles Mackenzie et al. vs. A. Howard Myers et al." in which the plaintiffs therein seek substantially the same relief against the defendants herein as is sought in this suit; and the Court being of opinion that both such suits should be heard and determined together and it not being possible to have the questions involved in both such suits adequately presented and heard at this time, it is by the Court this 4th day of May, 1936,

ORDERED that the above set forth temporary restraining order issued herein on the 27th day of April, 1936, be, and the same is, hereby continued and extended for a period of ten days or to and including May 14, 1936, and it is further

ORDERED that the defendants appear before this Court on May 19, 1936, at 10 o'clock in the forenoon at the

Federal Building, Boston, Massachusetts, to show cause why the verified bill of complaint herein should be dismissed and why a preliminary injunction should not issue in accordance with the prayers of the verified bill of complaint for restraining order and injunction and petition for declaratory judgment.

By the Court:

5/4/1936 MARY E. PRENDERGAST,
E. H. B. *Deputy Clerk.*
D. J.

On the 12th and 13th days of said May, the following affidavits are filed:

AFFIDAVITS OF H. E. D. GOULD, A. B. HOMER, EARL L. PRATT, W. H. COLLINS AND S. W. WAKEMAN

[Filed May 12, 1936.]

AFFIDAVIT OF H. E. D. GOULD.

COMMONWEALTH OF MASSACHUSETTS,
COUNTY OF NORFOLK, ss.:

H. E. D. GOULD, being first duly sworn, deposes and says:

I am a citizen of the United States and a resident of Quincy, Massachusetts, and I am over twenty-one years of age.

I have been associated with the Fore River Plant of Bethlehem Shipbuilding Corporation, Ltd., the above-named plaintiff, for approximately 32 years. I was first associated with said Plant as Inspector of Machinery for the United States Navy. My term of employment at said Plant began in 1912 when I became Assistant to the Chief Engineer of said Plant; thereafter from 1914 I was employed in various

other capacities until 1916 when I became Assistant Foreman of the Outside Machinists Department, of which I later became Foreman. In 1917 I became Superintendent of Machinery at said Plant; in 1918 I succeeded Mr. S. W. Wakeman as General Superintendent of said Plant, and in 1927 I succeeded him as General Manager there, which position I now hold. I hereinafter sometimes refer to said Corporation as the Shipbuilding Corporation and to said Plant as the Fore River Plant.

For 43 years of my life I have been an executive in charge of men and in the course of my employment at the Fore River Plant as General Superintendent I have had charge of over 16,000 men at one time.

It has been and is my duty as such General Manager, among other things, to exercise general supervision of said Plant and the conduct of the operations of the business of the Shipbuilding Corporation there in designing and building vessels and performing certain other manufacturing and processing operations there, and my duties include general supervision of the carrying out of the policies of the Shipbuilding Corporation at said Plant with respect to its relations with its employees there.

During my many years of employment at the Fore River Plant I have had every opportunity to know men and particularly those employed there and to learn their feelings regarding their relations with their employer at said Plant, and I believe that I do know the employees there and can speak with authority regarding them and their feelings concerning their employment.

This affidavit is made by me for the purpose of setting forth in a more orderly manner and of supplementing certain facts set forth in the bill of complaint for restraining order and injunction and petition for declaratory judgment herein.

The Fore River Plant is located along the waterfront

of Weymouth Fore River at Quincy and Braintree, Massachusetts. The area covered by said Plant consists of approximately 120 acres of land, part of which is land covered by water that is used as a basin in which vessels are completed and the machinery of which is tested after the launching thereof. In addition to such land covered by water used as such basin, a very small portion of such 120 acres of land is land covered by water upon which are erected the piers and similar equipment of said Plant.

At said Plant the Shipbuilding Corporation is engaged in the business of designing and building vessels of various kinds, sizes and descriptions. It also manufactures there, miscellaneous machine products and performs certain metal processing operations, but such work constitutes only a small percentage of the business of the Shipbuilding Corporation at said Plant.

In some instances, the Shipbuilding Corporation merely designs vessels but does not build them, and for that service charges a fee. In most cases, however, it both designs vessels and builds the vessels which it has designed.

The kinds of vessels built by the Shipbuilding Corporation at the Fore River Plant range from small steam fishing trawlers to the largest American vessels afloat. It has built at said Plant freight and passenger steamers, car floats, all types of barges, oil tankers, transoceanic passenger liners and naval vessels of all descriptions. It has from time to time manufactured, and now manufactures, as orders are received, miscellaneous machine products of various sorts and descriptions such as castings and replacement parts for various machines, and also performs certain metal processing operations such as the galvanizing of plates, shapes, pipe and miscellaneous products.

In carrying on its business of designing and building vessels at the Fore River Plant, it is necessary that the Shipbuilding Corporation fabricate and shape in its shops at

said Plant especially for each vessel built by it there practically all the materials used by the Shipbuilding Corporation in the building of such vessel and in addition thereto the Shipbuilding Corporation builds for the most part the boilers and main propelling machinery for each such vessel. In performing such fabricating, shaping and building operations, the Shipbuilding Corporation takes raw, semi-finished and finished products and fashions them into parts of the hull and machinery of vessels and into complete vessels. The vessels and other articles which have been, are being or are to be built at said Plant have not borne, do not bear and will not bear, any resemblance to the materials from which they were, are or will be, built or constructed. Such vessels and other articles, when finished, have been, are and will be, of far greater value than the materials which have been, are and will be, used in building and constructing them. The substantial increase in value was, is and will be, due to the manufacturing, fabricating and building operations performed by the Shipbuilding Corporation at said Plant.

Each employee of the Shipbuilding Corporation at the Fore River Plant who can in any way be said to be in the class of employees with respect to which the complaint of the National Labor Relations Board against the Shipbuilding Corporation was made is engaged and employed in connection with the shipbuilding, designing, manufacturing and processing operations of the Shipbuilding Corporation at said Plant.

The Fore River Plant constitutes an integrated manufacturing plant which was designed for and is used in the conduct of the business of the Shipbuilding Corporation there of designing and building vessels and performing certain other manufacturing and processing operations. As set forth in the bill of complaint and petition herein, said Plant contains numerous buildings, fixtures and equipment necessary to the conduct of the business there, including eight ship-

building slips, five piers at which ships are completed after the launching thereof, a plate shop, a pattern shop, a mould loft, an electric shop, a riggers loft, a machine shop, a blacksmith shop, a pipe and copper shop, a carpenter and joiner shop, a paint shop, a boiler shop, a sheet metal shop, a brass and aluminum foundry, a storeroom, four warehouses, a power house and a power house sub-station, an employment office, an hospital, an emergency first-aid hospital, two plate and shape storage yards, pickling and wash tanks, a galvanizing plant, a building for foundry flask storage, two assembly and storage areas, a building for bending boiler tubes, a lumber store building and dry kilns, a scrap yard, two air compressor stations, a bolt, nut and rivet reclaiming plant, a material testing house, an apprentice school building, a boiler plant for burning waste material, an administrative office building, a main office building, miscellaneous storerooms and offices, and other miscellaneous equipment and accessories and such plant is equipped with the necessary lathes, pipe benders, punches, sheers, rolls, steam hammers, keel benders, electric and spot welding equipment, shop, pier, storeroom and yard cranes, complete woodworking equipment, complete sheet metal fabricating equipment, complete equipment for building water tube boilers, and other machinery necessary to the operation of such integrated manufacturing plant in the conduct at the Fore River Plant of the business of the Shipbuilding Corporation of building vessels and performing certain other manufacturing and processing operations.

The Plan of Employees' Representation of the employees of the Shipbuilding Corporation at the Fore River Plant which is in effect there was adopted in March of 1923. During the years prior to 1923 and from the period of the World War, there were intermittent labor disturbances at said Plant and for some portions of the years between 1919 and 1923 there were frequent strikes and walkouts by

groups of employees in various Sections and Departments of said Plant. Because of such disturbances the existence of pleasant and harmonious relations between the Shipbuilding Corporation and its employees at said Plant was prevented and the efficiency of such employees was retarded and thereby the operation of said Plant interfered with and in general conditions there were stirred up and the operations impeded.

In marked contrast to the conditions which existed at said Plant during the period just described, since the adoption of said Plant in 1923 there have been no labor disturbances or labor trouble of any nature whatsoever at said Plant. All questions concerning rates of pay, wages, hours of employment and other conditions of employment, and all grievances or other questions of interest to employees have been expeditiously and satisfactorily settled from time to time through negotiation with the Employees' Representatives elected under said Plan. Since 1923 in almost constantly increasing measure there have existed and there now exists at said Plant the most pleasant, friendly and harmonious relations between the Shipbuilding Corporation and its employees.

Nevertheless, there has been much propaganda disseminated among the employees of the Shipbuilding Corporation at its Fore River Plant and throughout Braintree and Quincy and their environs in which they live to the effect that said Employees' Representation Plan interferes with, restrains and coerces the employees in the exercise of their rights "as guaranteed under Section 7" of the National Labor Relations Act; that the reason why there has been no labor trouble since said Plan became effective is that the Management at said Plant has used coercion; that the Employees' Representatives elected under said Plan, instead of representing the employees, were simply "tools" of the Shipbuilding Corporation; that employees of the Shipbuilding Corporation will support the Government of the United States by boycotting

elections under said Plan; that said Plan is "a fake" and "illegal"; that the Employees' Representatives under said Plan have "intimidated" or tried to "intimidate" employees; and "are helping the Company [the Shipbuilding Corporation] block the U. S. Government from holding a fair and honest election at Fore River." All of said statements are entirely false, but the situation at the Fore River Plant is such that the prosecution of the investigation instituted by the National Labor Relations Board by the issuance of said Complaint and the holding of hearings thereon and the taking of any proceedings in connection therewith will inevitably increase the circulation of such propaganda, and the fact that an agency of the Federal Government is prosecuting such hearings and proceedings will, in my opinion, be taken by a large number of the employees of the Shipbuilding Corporation as evidence, and perhaps conclusive evidence, of the truth of such propaganda.

In my opinion, based upon my above-described past experience and knowledge of employer-employee relationships, and particularly upon my knowledge of such relationships at said Fore River Plant and the condition which existed there prior to 1923, and as set forth in the bill of complaint and petition herein, the pendency of and the holding of the hearing originally scheduled to be held on April 27, 1936, by the National Labor Relations Board, the continuation thereof, and the holding and continuation of any proceedings thereon or in connection therewith (regardless of the outcome thereof), and the taking or carrying out of any action in connection therewith, will seriously damage the friendly, pleasant and harmonious relations between the Shipbuilding Corporation and its employees at Fore River Plant, and the Shipbuilding Corporation will be impeded in the enjoyment of benefits thereof, and the efficiency of such employees will be lessened because of the disturbing and upsetting condition which will be created and maintained among such employees

as a result of such hearings and continuation of proceedings thereon and action taken in connection therewith, which will also cause the Shipbuilding Corporation to suffer damage in the loss of prospective profits and which it will be entirely impossible accurately to estimate in pecuniary value.

Moreover, from my knowledge of employees in general, and of employees at the Fore River Plant gained over the many years of close association and dealing with employees which I have above described, I am of the opinion that, as set out in the bill of complaint, the National Labor Relations Board, in charging the Shipbuilding Corporation with engaging in unfair labor practices, is holding it up to the scorn of its employees as an employer engaged in unfair labor practices, to their detriment and injury, and is thereby causing the Shipbuilding Corporation to incur the odium and ill will of such employees and to be in disrepute therewith, and I am sure that such scorn of, ill will toward, and disrepute on the part of, such employees will be continued and magnified so long as any proceedings in connection therewith shall continue. Such odium, ill will and disrepute will be bound adversely to affect the work which such employees would otherwise do and be very disturbing factors among them, all of which would greatly damage and injure the Shipbuilding Corporation and its business at the Fore River Plant, the amount of which injury and damage (as is the case with the injury and damage above referred to) unquestionably could not be measured in dollars and cents.

I have read the so-called "Return" made and verified in this suit by the defendants on May 4, 1936. To say that under the National Labor Relations Act or any rules or regulations made by the National Labor Relations Board pursuant to the provisions thereof the proceedings before the National Labor Relations Board referred to in the bill of complaint and petition herein may be ignored with impunity or to say that after the completion of the

hearing scheduled to be held in such proceeding such Board may not make a cease and desist order, or that, if one shall be made therein, it may be ignored until it shall have been reviewed by a Court and an order for the enforcement thereof shall have been made by such Court, or that such Board might not ask a Court for a review of such cease and desist order, and that, therefore, nothing injurious to the Shipbuilding Corporation could result from such proceeding for which it will not thereafter have an adequate and complete remedy, is in my opinion, based on years of experience in dealing with workmen and in managing the business of the Shipbuilding Corporation at the Fore River Plant, the height of folly. The damage will be done by such hearing whether or not a cease and desist order shall be made as the result thereof and whether or not any cease and desist order made after such hearing shall be reviewed by any Court at the instance of such Board or of the Shipbuilding Corporation. No review by any Court, whatever the result, can undo such damage. To urge to the contrary is to urge "the locking of the barn after the horse has been stolen." No amount of locking can result in a recovery of the horse; no amount of ignoring the processes of such Board and no failure of review of any order thereof can result in undoing the injury that will be done to the Shipbuilding Corporation by the hearing which the Shipbuilding Corporation in such bill of complaint and petition seeks to have enjoined by this Court.

I am surprised at the denial made by the defendants in Paragraph 13 of the so-called "Return" made and verified in this suit by them on May 4, 1936, "for lack of knowledge, * * * that the National Labor Relations Board has threatened to require many employees of the plaintiff to appear at the hearing before a Trial Examiner as witnesses.", and the averment in said paragraph on information and belief, that the members of the National Labor Relations Board "have

not issued any subpoenas and have not threatened to issue any subpoenas" requiring the attendance of witnesses and the production of evidence in the case before such Board, a hearing on which was scheduled for April 27, 1936. The reason for my surprise is that prior to May 4, 1936, I received a subpoena of the National Labor Relations Board to attend at said hearing, and I am informed that another official of the Shipbuilding Corporation at the Fore River Plant and three employees there also prior to such date received subpoenas to appear as witnesses at said hearing.

The subpoena which I received was received by registered mail, enclosed in an envelope post marked Boston, Massachusetts, and such subpoena was purportedly signed by Edwin S. Smith, a member of the National Labor Relations Board.

The subpoena which I received as above-stated is in words and figures as follows:

"Subpoena

UNITED STATES OF AMERICA

National Labor Relations Board

"To H. E. Gould, General Manager,
Fore River Plant, Bethlehem Shipbuilding Corpn., Ltd.,
79 East Howard Street, Quincy, Massachusetts:

"You are hereby required to appear before a Trial Examiner of the National Labor Relations Board, at Room 1309 Federal Building in the City of Boston, Massachusetts, on the 27th day of April, 1936, at ten o'clock a.m. of that day, to testify in the Matter of Bethlehem Shipbuilding Corpn. Ltd. and Industrial Union of Marine and Shipbuilding Workers of America.

"Fail not at your peril.

"In testimony whereof, the seal of the National Labor Relations Board is affixed hereto, and the undersigned, a member of said National Labor Relations Board, has hereunto set his hand at Washington, D. C., this 23d day of April, 1936.

[SEAL]

EDWIN S. SMITH."
H. E. D. GOULD.

Subscribed and sworn to before me this 11th day of May, 1936.

GRACE J. FLYE,
Notary Public.

AFFIDAVIT OF A. B. HOMER.

COMMONWEALTH OF MASSACHUSETTS,
COUNTY OF NORFOLK, SS.:

A. B. HOMER, being first duly sworn, deposes and says:

I am a citizen of the United States and a resident of Quincy, Massachusetts, and I am over twenty-one years of age.

I now am and since November, 1934, I have been Assistant Vice-President of Bethlehem Shipbuilding Corporation, Ltd., the above-named plaintiff (to which I herein sometimes refer as the Shipbuilding Corporation). For eight years prior to the time when I became such Assistant Vice-President I was Sales Manager of the Shipbuilding Corporation. My official office is at its Fore River Plant, which is located on Weymouth Fore River, at Quincy and Braintree, Massachusetts.

It is my duty as such Assistant Vice-President, among

other things, subject to instructions from Mr. S. W. Wakeman, Vice-President of the Shipbuilding Corporation, to exercise general supervision of all sales and the making of all contracts for the building of vessels and the manufacturing of machine products and the performance of processing operations at the Fore River Plant of the Shipbuilding Corporation. In the performance of my duties I consult with the responsible officials of the Shipbuilding Corporation concerning its actions and policies with respect to its relations with its employees at its Fore River Plant and I am authorized to speak on behalf of the Shipbuilding Corporation with respect to such actions and policies.

I make this affidavit for the purpose of setting forth in orderly form and supplementing certain facts set forth in the bill of complaint for restraining order and injunction and petition for declaratory judgment herein.

There is being filed herewith an affidavit by Earle L. Pratt, the works accountant at the Fore River Plant in which he shows that approximately 97½% of the business of the Shipbuilding Corporation at the Fore River Plant consists of designing and building vessels of various kinds, sizes and descriptions. Each of such vessels is built by the Shipbuilding Corporation under a specific contract with the person, firm or corporation for whom such vessel is to be built and the Shipbuilding Corporation builds vessels at the Fore River Plant only under specific contracts therefor. All the other work done by the Shipbuilding Corporation at the Fore River Plant, which consists of manufacturing machine products, and of performing metal processing operations and other similar work is done only on specific orders from persons, firms or corporations for whom such products are to be manufactured or such operations or work to be performed. With possibly a few exceptions where extraordinary or peculiar circumstances call for other delivery, such contracts require that the vessels built thereunder be delivered and such vessels are delivered at the Fore River Plant.

Since the date of the hearings and decision of the Old Labor Board in the First Fore River Case there has been no change in the operation of the Plan of Employees' Representation or in the policy or actions of the Shipbuilding Corporation with respect thereto. As far as I know, there has been no change in the operations under said Plan by the employees.

My attention has been called to the so-called "Return" made and verified in this suit by the defendants Myers and Blake on May 4, 1936, and I have noted the statement in paragraph 18 thereof that the "defendants deny knowledge of facts in connection with the Employees Representation Plan and the policies and acts of the plaintiff", that is, the Shipbuilding Corporation. The Employees Representation Plan there referred to is the Employees' Representation Plan in effect at the Fore River Plant.

On March 2, 1936, prior to the issuance of the Complaint of the National Labor Relations Board against the Shipbuilding Corporation, the defendants Myers and Blake conferred with me at my office at the Fore River Plant. They then stated that they came with respect to the charge that theretofore had been made by the Industrial Union of Marine & Shipbuilding Workers of America, Local No. 5 against the Shipbuilding Corporation. I am advised and believe that said Complaint of the National Labor Relations Board is based upon that charge of Local No. 5. At the outset of the conference they stated to me that they came to me for the purpose of satisfying themselves regarding certain questions raised by such charge and to determine whether the facts would justify any further action on their part.

The defendant Blake, as I am advised and believe, has been connected with the National Labor Relations Board, or the Old Labor Board referred to in the bill of complaint and petition herein, since prior to the First Fore River Case therein referred to. I saw him several times during the

hearings in that case in the court room where they were held. He conducted certain investigations that were made in connection therewith and must have been familiar with the case and the testimony that was given therein.

At the above mentioned conference which I had with the defendants Myers and Blake on March 2, 1936, the above mentioned Plan of Employees' Representation and the policies and actions of the Shipbuilding Corporation with respect thereto were thoroughly discussed. Particular reference was made to the First Fore River Case and the defendants Myers and Blake clearly addressed themselves to the question of the relations between the Shipbuilding Corporation and its employees at the Fore River Plant with respect to said Plan of Employees' Representation. At such conference I clearly told the defendants Myers and Blake that no change had been made in the policy and actions of the Shipbuilding Corporation with respect to said Plan and that, so far as the officials of the Shipbuilding Corporation knew or had been advised, no change had been made in the operations under said Plan by the employees of the Shipbuilding Corporation at the Fore River Plant.

A. B. HOMER.

Subscribed and sworn to before
me this 11th day of May, 1936.

GRACE J. FLYE,
Notary Public.

[SEAL]

AFFIDAVIT OF EARLE L. PRATT.

COMMONWEALTH OF MASSACHUSETTS,
COUNTY OF NORFOLK, ss.:

EARLE L. PRATT, being first duly sworn, deposes and says:

I am a citizen of the United States and a resident of Quincy, Massachusetts, and I am over twenty-one years of age.

I now am and for approximately six years last past have been Works Accountant of the Fore River Plant of Bethlehem Shipbuilding Corporation, Ltd., the above-named plaintiff, which Plant is located on Weymouth Fore River at Quincy and Braintree, Massachusetts. I hereinafter sometimes refer to said Corporation as the Shipbuilding Corporation and to said plant as the Fore River Plant.

It is my duty as such Works Accountant, among other things, to keep and cause to be kept accurate and detailed records of all billings made by the Shipbuilding Corporation for the building and delivery of vessels, for the manufacturing of machine products and for the performance of processing operations at the Fore River Plant, and also to keep accurate and detailed records of the cost of materials used by the Shipbuilding Corporation in building vessels and in other work at said Plant.

I make this affidavit for the purpose of setting forth in orderly form and supplementing certain facts set forth in the bill of complaint for restraining order and injunction and petition for declaratory judgment herein.

I have examined the records at the Fore River Plant with respect to billings for vessels and machine products built or manufactured by the Shipbuilding Corporation at the Fore River Plant and for the performance by it of processing operations there, and I find that at the present time and for a considerable period last past approximately 97.5% of the business of the Shipbuilding Corporation at the Fore River Plant consists and consisted of designing and building vessels of various kinds, sizes and descriptions, and only approximately 2.5% of such business consists and consisted of the other above-mentioned work at that Plant. Likewise, I have examined said records with respect to the cost of materials used by the Shipbuilding Corporation in building vessels at said Plant, and I find that the cost of such materials represents less than one-half of the selling value of the

vessels built by the Shipbuilding Corporation at the Fore River Plant and received by it therefor, and, therefore, that more than one-half of such selling value of such vessels results from operations in Massachusetts and is not represented by the cost of such materials used by the Shipbuilding Corporation in building such vessels.

EARLE L. PRATT.

Subscribed and sworn to before
me this 11th day of May, 1936.
GRACE J. FLYE,
Notary Public.

[SEAL]

AFFIDAVIT OF W. H. COLLINS.

COMMONWEALTH OF MASSACHUSETTS,
COUNTY OF NORFOLK, ss.:

W. H. COLLINS, being first duly sworn, deposes and says:

I am a citizen of the United States and a resident of Quincy, Massachusetts, and I am over twenty-one years of age.

I now am and for approximately three years last past have been Assistant General Manager of the Fore River Plant of Bethlehem Shipbuilding Corporation, Ltd., the above-named plaintiff, which Plant is located on Weymouth Fore River at Quincy and Braintree, Massachusetts. I hereinafter sometimes refer to said Corporation as the Shipbuilding Corporation and to said Plant as the Fore River Plant.

It is my duty as such Assistant General Manager, among other things, subject to instructions from the General Manager, to exercise general supervision of said Plant and the conduct of the operations of the business of the Shipbuilding Corporation there in designing and building vessels and per-

forming certain other manufacturing and processing operations there, and my duties include, subject to such instructions, direct supervision of the carrying out of the policies of the Shipbuilding Corporation at said Plant with respect to its relations with its employees there.

I make this affidavit for the purpose of setting forth in an orderly manner and supplementing certain facts set forth in the bill of complaint for restraining order and injunction and petition for declaratory judgment herein.

As set forth in paragraph 16 of such bill of complaint and petition herein, hearings in the First Fore River Case, were held at Boston, Massachusetts, beginning October 1, 1934, and extending throughout that entire month from time to time, some of such hearings continuing to late in the evening and the final hearing having been held October 31, 1934. The stenographic transcript of the record in that case covered approximately 1550 typewritten pages (including approximately 100 pages covering the argument of such case before the Old Labor Board at Washington, D. C.). Such hearings and the work which it was necessary to do in connection therewith and in preparation therefor placed a very substantial burden upon, and constituted a real obstacle to, the efficient operation of the Fore River Plant at that time. As set forth in paragraph 17 of the bill of complaint and petition, 28 employees and officials of the Shipbuilding Corporation were called as witnesses in that case and in addition thereto, a number of the foremen and leading men of the Shipbuilding Corporation employed at said Plant, as well as other employees, were required from time to time to be in attendance at the hearings in such Case. The attendance at such hearings of such foremen and leading men and employees and officials of the Shipbuilding Corporation, including employees and officials who were witnesses at such hearings, made it necessary for the management of said Plant to take extraordinary measures solely because of such hearings to pre-

vent in so far as possible the continuity and efficiency of operation of said Plant from being seriously disturbed.

Beginning at about the time that the agitation started at said Plant concerning the Industrial Union of Marine Shipbuilding Workers of America (the complainant in the First Fore River Case as well as in the present case before the National Labor Relations Board) considerable unrest amongst the employees at said Plant was evidenced, particularly among those employees who had long service records who were fearful of losing the benefits accruing to them because of their service, which they felt were guaranteed to them under the Plan of Employees' Representation in effect at said Plant. Such unrest reached its height during the hearings in the First Fore River Case and a majority of the employees at said Plant who had voted under said Plan evidenced a feeling that Local 5 of said Industrial Union was attempting by means of the case before the Old Labor Board to force upon such employees a means of collective bargaining which they did not desire.

As a result of the First Fore River Case and the reaction caused among the employees by it, there was a general let-down in the morale of such employees. Employees with long service records, commonly known as "old timers", frequently and continually came to the offices of the Shipbuilding Corporation at said Plant and inquired whether or not something could be done to make sure that nothing would happen to said Plan. Other employees volunteered to testify as to the benefits that they had received under said Plan and groups of employees gathered constantly about Employees' Representatives on days after hearings had been held in the First Fore River Case to find out what had happened at the hearings and what might happen and to discuss the case.

As set forth in such paragraph 17 of such bill of complaint and petition, as a result of such attendance at such

hearings, a total of not less than 2,500 working hours away from said plant were spent at such hearings, and in addition to such 2,500 working hours, a very great many working hours were spent by foremen and leading men in connection with and in preparation for such hearings. Moreover, as set forth in such bill of complaint and petition, several officials of the Shipbuilding Corporation, including the Vice-President of the Shipbuilding Corporation in general charge at said Fore River Plant, were required to spend many days at such hearings and in connection therewith, in order to assist counsel for the Shipbuilding Corporation in properly defending the Shipbuilding Corporation thereat. I and the General Manager of said Plant, in particular, were required to spend by far the greater part of the entire month of October, 1934, in connection with such hearings, which necessitated our neglecting important matters in connection with the operation of the Fore River Plant. As set forth in such bill of complaint and petition, as a result of the aforesaid attendance of employees and officials of the Shipbuilding Corporation and the time spent by them in connection therewith and in preparation therefor, an extremely large amount of working time was lost which, in addition to the outof-pocket cost to the Shipbuilding Corporation in excess of $15,000, as set forth in such bill of complaint and petition, resulted in a very substantial irreparable and irrecoverable loss and injury to the Shipbuilding Corporation which could not be calculated in a pecuniary value.

I have read the so-called "Return" made and verified in this suit by the defendants on May 4, 1936, and I am surprised at the denial made by the defendants in Paragraph 13 thereof "for lack of knowledge, *** that the National Labor Relations Board has threatened to require many employees of the plaintiff to appear at the hearing before a Trial Examiner as witnesses.", and the averment in said

paragraph, on information and belief, that the members of the National Labor Relations Board "have not issued any subpoenas and have not threatened to issue any subpoenas" requiring the attendance of witnesses and the production of evidence in the case before such Board, a hearing on which was scheduled for April 27, 1936. The reason for my surprise is that prior to May 4, 1936, I received a subpoena of the National Labor Relations Board to attend at said hearing, and I am informed that the General Manager at the Fore River Plant and three employees there also prior to such date received subpoenas to attend as witnesses at said hearing.

The subpoena which I received was received by registered mail enclosed in an envelope postmarked Boston, Massachusetts, and such subpoena was purportedly signed by Edwin S. Smith as a member of the National Labor Relations Board.

The subpoena which I received as above stated is in words and figures as follows:

"SUBPOENA

UNITED STATES OF AMERICA

, National Labor Relations Board

"To W. H. Collins, Assistant General Manager
Fore River Plant, Bethlehem Shipbuilding Corpn.
Ltd., Quincy, Massachusetts

"You are hereby required to appear before a Trial Examiner of the National Labor Relations Board, at Room 1309 Federal Building in the City of Boston, Massachusetts on the 27th day of April, 1936, at ten o'clock a. m. of that day, to testify in the Matter of Bethlehem

Shipbuilding Corpn. Ltd. and Industrial Union of Marine and Shipbuilding Workers of America

"Fail not at your peril.

"In testimony whereof, the seal of the National Labor Relations Board is affixed hereto, and the undersigned, a member of said National Labor Relations Board, has hereunto set his hand at Washington, D. C. this 23d day of April, 1936.

Edwin S. Smith"

[SEAL]

W. N. COLLINS.

Subscribed and sworn to before me this 11th day of May, 1936.

GRACE J. FLYE,

[SEAL] *Notary Public.*

AFFIDAVIT OF S. W. WAKEMAN.

COMMONWEALTH OF MASSACHUSETTS,
COUNTY OF NORFOLK, ss.:

S. W. WAKEMAN, being first duly sworn, deposes and says:

I am a citizen of the United States and a resident of Quincy, Massachusetts, and I am over twenty-one years of age.

I now am and for approximately nine years last past have been a Vice-President of Bethlehem Shipbuilding Corporation, Ltd. My principal office is at the Fore River Plant of said Corporation, which is located on Weymouth Fore River at Quincy and Braintree, Massachusetts. I hereinafter sometimes refer to said corporation as the Shipbuilding Corporation and said plant as the Fore River Plant.

It is my duty as such Vice-President, among other things,

to exercise general supervision over all of the officials and employees of the Shipbuilding Corporation at the Fore River Plant, including general supervision of the actions and policies of the plaintiff at said Plant with respect to its relations with its employees there.

I make this affidavit for the purpose of setting forth in an orderly manner and supplementing certain facts set forth in the bill of complaint for restraining order and injunction and petition for declaratory judgment herein.

All of the officials of the Shipbuilding Corporation at the Fore River Plant and all of its employees there who have the power to recommend the hiring or discharging of other employees or who regularly hold supervisory positions have been instructed (and the instructions have been kept before them) that they should not in any manner whatsoever dominate or interfere with any representatives of the employees of the plaintiff at said Plant, nor with any persons claiming directly or indirectly to be the accredited representatives of such employees, either under the Plan of Employees' Representation in effect at said Plant or otherwise. No instance of any such domination or attempted domination, or interference or attempted interference, has been brought to my attention; and if any such instance had occurred, it would naturally have come to my attention.

Moreover, instructions have from time to time been given to all of the officials of the Shipbuilding Corporation at the Fore River Plant and all of its employees there who have the power to recommend the hiring or discharging of other employees or who regularly hold supervisory positions that they should not in any manner whatsoever dominate, interfere with, intimidate or coerce any employees of the plaintiff at said Plant in connection with the Nominations and Elections held each year under the Plan of Employees' Representation which since 1923 has been in effect at said Plant. No instance of any domination or attempted domina-

tion, interference or attempted interference, intimidation or attempted intimidation, or coercion or attempted coercion, has been brought to my attention; and if any such instance had occurred, it would naturally have come to my attention.

Subscribed and sworn to before
me this 11 day of May, 1936.

FRANCIS J. LEAHY,
Notary Public.

My Commission Expires June 4, 1938.

[SEAL]

S. W. WAKEMAN.

AFFIDAVIT OF CHARLES MACKENZIE.
[FILED MAY 12, 1936.]

AFFIDAVIT OF WILLIAM HARVEY.
[FILED MAY 12, 1936.]

AFFIDAVIT OF WILLIAM G. McDERMOTT.
[FILED MAY 12, 1936.]

AFFIDAVIT OF MARK HANNABURY.
[FILED MAY 12, 1936.]

AFFIDAVIT OF THOMAS E. BARKER.
[FILED MAY 13, 1936.]

[MEMORANDUM. Pursuant to the praecipe of plaintiff, affidavits of MacKenzie, Harvey, McDermott, Hannabury and Barker filed in case No. 4324, Equity, which the parties agreed at the time of the trial, might be considered in this case as filed herein, are here inserted and will be found printed on pages 167-180 of this volume. JAMES S. ALLEN, *Clerk.*]

On the 14th day of May, A. D. 1936, the following order continuing restraining order to May 24, 1936, is entered:

ORDER CONTINUING RESTRAINING ORDER TO MAY 24, 1936.

May 14, 1936.

BREWSTER, J. This cause came on for hearing upon motion of the plaintiff to continue the existing restraining order, and it appearing to the Court that the situation existing at the time of the entry of the order on May 4, 1936, continuing the restraining order has not changed, and that irreparable injury would result if such restraining order were dissolved, it is hereby

ORDERED that the temporary restraining order issued herein on the 27th day of April, 1936, be and the same is hereby continued and extended for a period of ten days to and including May 24, 1936.

By the Court:

JAMES S. ALLEN,
Clerk.

May 14, 1936.
E. H. B.
D. J.

SUPPLEMENTAL AFFIDAVIT OF CHARLES MacKENZIE.
[FILED MAY 19, 1936.]

SUPPLEMENTAL AFFIDAVIT OF WILLIAM G. McDERMOTT.
[FILED MAY 19, 1936.]

SUPPLEMENTAL AFFIDAVIT OF THOMAS E. BARKER.

[FILED MAY 19, 1936.]

[MEMORANDUM. Pursuant to the praecipe of plaintiff, the supplemental affidavits of MacKenzie, McDermott and Barker, filed in case No. 4324, Equity, which the parties agreed at the time of the trial might be considered in the case as filed herein, are here inserted and will be found printed on pages 182-189 of this volume. JAMES S. ALLEN, CLERK.]

On the 22nd day of May, A. D. 1936, the following order continuing restraining order to June 3, 1936, is entered:

ORDER CONTINUING RESTRAINING ORDER TO JUNE 3, 1936.

May 22, 1936.

BREWSTER, J. This cause came on for hearing upon motion of the plaintiff to continue the existing restraining order, and it appearing to the Court that the situation existing at the time of the entry of the order on May 4, 1936, continuing the restraining order has not changed, and that irreparable injury would result if such restraining order were dissolved, it is hereby

ORDERED that the temporary restraining order issued herein on the 27th day of April, 1936, be and the same is hereby continued and extended for a period of ten days to and including June 3, 1936.

By the Court,
HELEN I. TWEEDY,
Deputy Clerk.

May 22, 1936.
E. H. B.
D. J.

On the 27th day of May, A. D. 1936, the Honorable Elisha H. Brewster, District Judge, sitting, said cause again comes on to be heard on the motion to dismiss and the prayer for preliminary injunction.

On the said 27th day of May, A. D. 1936, a memorandum of the court is announced.

On the 28th day of May, A. D. 1936, after due consideration thereon had, the following findings of fact is filed:

FINDINGS OF FACT ON HEARING FOR TEMPORARY INJUNCTION.

[Filed May 28, 1936.]

BREWSTER, J. I find all of the facts alleged in the plaintiff's bill of complaint (as distinguished from statements and conclusions of law) to be true.

I also find that witness subpoenas of the National Labor Relations Board were received as set forth in the affidavits of H. E. D. Gould and W. H. Collins, filed in Equity No. 4321, and the following affidavits filed in Equity Number 4324: supplemental affidavit of Charles MacKenzie, supplemental affidavit of William G. McDermott; and a subpoena *duces tecum* was received by Thomas E. Barker as set forth in his supplemental affidavit filed in Equity Number 4324.

It does not appear that any damage, inconvenience or loss of rights will be suffered by any person if, until a decision on the defendants' motion to dismiss the bill of complaint, there is a postponement of all hearings for the purpose of determining whether or not the plaintiff has engaged at its Fore River Plant in any so-called "unfair labor practices" under the National Labor Relations Act and of all proceedings and actions with respect thereto.

Conclusions of Law.

1. There is grave doubt whether the National Labor Relations Act of July 5, 1935, is not wholly unconstitutional and void.

2. It appears that the plaintiff will suffer irreparable damage of the kinds alleged in its bill of complaint if any hearing is held for the purpose of determining whether or not the plaintiff has engaged at its Fore River Plant in any so-called "unfair labor practices" under the National Labor Relations Act, or if any proceedings or action whatsoever is taken with respect thereto.

3. On the facts presented I am not now able to conclude that the plaintiff has a plain, adequate and complete remedy at law.

Thereupon, on the said 28th day of May, A. D. 1936, the following order granting preliminary injunction is entered:

ORDER GRANTING PRELIMINARY INJUNCTION.

May 28, 1936.

BREWSTER, J. This cause came on to be heard at this term upon an order to show cause granted April 27, 1936, upon application of the plaintiff for a preliminary injunction, upon the plaintiff's verified bill of complaint, upon an affidavit of the defendants Myers and Blake designated "Return", and the affidavits of H. E. D. Gould, A. B. Homer, Earle L. Pratt, W. H. Collins and S. W. Wakeman, all verified the 11th day of May, 1936, and the affidavits filed in Equity Number 4324 (which it was stipulated might be considered in this cause)—affidavits of Charles MacKenzie, William Harvey, William G. McDermott, and Mark Hannabury, all verified the 12th day of May, 1936, the affidavit of Thomas E. Barker, verified the 13th day of May, 1936, and

the supplemental affidavits of Thomas E. Barker, Charles MacKenzie and William G. McDermott, all verified the 18th day of May, 1936,—and was argued by counsel;

And thereupon, upon consideration thereof,

It appearing to the Court that there is grave doubt whether the National Labor Relations Act of July 5, 1935, is not wholly unconstitutional, and

It appearing that the issuance of a preliminary injunction is necessary to prevent immediate and irreparable damage, for the reason that the holding of any hearing for the purpose of determining whether or not the plaintiff has engaged at its Fore River Plant in any so-called "unfair labor practices" under the National Labor Relations Act, or taking any action with respect thereto, would involve expense to the plaintiff which it could not recover, absence of its officials and employees from their work, which would interfere with the operation of the plaintiff's Fore River Plant, and disturbance of harmonious relations with its employees; and

It not appearing that the plaintiff has a plain, adequate and complete remedy at law, and that immediate, continual and irreparable loss and damage to the plaintiff will result unless a preliminary injunction is granted herein as hereinafter set forth; it is hereby

ORDERED, ADJUDGED and DECREED as follows, viz.:

The defendants A. Howard Myers, individually and as Acting Regional Director for the First Region of the National Labor Relations Board, and Edmund J. Blake, individually and as Regional Attorney for the First Region of the National Labor Relations Board, and Daniel M. Lyons, individually and as Trial Examiner of the National Labor Relations Board, and each of them, their agents, agencies, assistants,

employees and representatives and any one in active concert or participating with them and each of them, and their successors in office and each of them and their agents, agencies, assistants, employees and representatives and any one in active concert or participating with them and each of them, be and they are hereby enjoined from holding or causing to be held at any time or times a hearing for the purpose of determining whether or not the plaintiff has engaged at its Fore River Plant in any so-called "unfair labor practices" under the National Labor Relations Act, and from having any proceedings or taking any action whatsoever at any time or times with respect thereto.

It is further ORDERED that the plaintiff forthwith give a penal bond in the sum of Five Hundred Dollars ($500), and that said temporary injunction remain in full force and effect until final hearing of this cause, or until said injunction is dissolved by order of the Court if the defendants prevail in their motion to dismiss.

By the Court,
JOHN E. GILMAN, JR.,
Deputy Clerk.

May 28, 1936.
E. H. B.
D. J.

WRIT OF INJUNCTION.
UNITED STATES OF AMERICA.

MASSACHUSETTS DISTRICT, ss.:

THE PRESIDENT OF THE UNITED STATES OF AMERICA,

[SEAL]

To A. Howard Myers, individually and as Acting Regional Director for the First Region of the National Labor Relations Board, and Edmund J. Blake, individually and as Regional Attorney for the First Region of the National Labor Relations Board, and Daniel M. Lyons, individually and as Trial Examiner of the National Labor Relations Board,

Your Agents and Servants, GREETING:

Whereas, Bethlehem Shipbuilding Corporation, Ltd., a corporation organized and existing under the laws of the State of Delaware, and a citizen of the United States and of the State of Delaware, has exhibited its Bill of Complaint before the Judge of our District Court of the United States, begun and holden at Boston, within and for the District of Massachusetts, on the third Tuesday of March, A. D. 1936, against you the said A. Howard Myers, Edmund J. Blake and Daniel M. Lyons, praying to be relieved touching the matters therein complained of, and whereas, by an order of said Court made on the twenty-eighth day of March, A. D. 1936, it was ordered that a Writ of Injunction issue under the Seal of the said Court, to restrain you and each and every of you, from doing all the matters and things hereinafter mentioned, as prayed for in said Bill, We, therefore, in consideration thereof, ENJOIN AND COMMAND you each, and every of you, that from and immediately after the receipt and notice of this our Writ, by you, or any of you, you, and each of you, your agents, agencies, assistants, employees and representatives and any one in active concert or participating with you, and each of you, and your successors in office and each of them and their agents, agencies, assistants, employees and representatives and any one in active concert or participating with them and each of them, shall not hold or

cause to be held at any time or times a hearing for the purpose of determining whether or not the said Bethlehem Shipbuilding Corporation, Ltd., Plaintiff herein, has engaged at its Fore River Plant in any so-called "unfair labor practices" under the National Labor Relations Act, or have any proceedings or take any action whatsoever at any time or times with respect thereto, until the further order of the court.

Whereof you are not to fail on pain of ten thousand dollars, to be levied on your and each of your goods, chattels, lands and tenements, to our use.

WITNESS the HONORABLE ELISHA H. BREWSTER, at Boston, this second day of June, in the year of our Lord one thousand nine hundred and thirty-six.

JAMES S. ALLEN, *Clerk.*
by JOHN E. GILMAN, JR., *Deputy Clerk.*

OFFICER'S RETURN ON WRIT OF INJUNCTION.

UNITED STATES OF AMERICA,
MASSACHUSETTS DISTRICT, ss.: Boston, June 2nd, 1936.

I HEREBY CERTIFY that I have notified the within-named respondents A. Howard Myers and Edmund J. Blake, by giving to each of them in hand at Federal Building, Boston, in said District, at three o'clock and 20 minutes P. M. a true and attested copy of this Injunction.

JOHN J. MURPHY, *U. S. Marshal,*
By RALPH W. GRAY, *Deputy U. S. Marshal.*

[NOTE. On May 29, 1936, a bond in the sum of five hundred dollars ($500), dated May 29, 1936, was filed by the United States Guarantee Company, on behalf of the Bethlehem Shipbuilding Corporation, Ltd., guaranteeing the payment of such costs and damages as may be suffered by A. Howard Myers et al., if they are found to be wrongfully enjoined. JAMES S. ALLEN, CLERK.]

From the foregoing order granting preliminary injunction, the defendants claim an appeal to the United States Circuit Court of Appeals for the First Circuit on June 26, 1936, which appeal was allowed by the court on the same day.

MEMORANDUM.

May 27, 1936.

No. 4321, Eq. Bethlehem Shipbuilding Corp., Ltd. v. A. Howard Myers et al.

No. 4324, Eq. Charles MacKenzie et al. v. A. Howard Myers, et al.

BREWSTER, J. The defendants have filed motions to dismiss the bills of complaint. The suits are before the Court upon these motions and plaintiffs' prayers for injunctive relief. Both the motions and the prayers have been argued at length. Numerous cases have been cited in support of the defendants' contention that the Court is without jurisdiction to grant injunctive relief. Other cases have been cited by plaintiffs in urging the unconstitutionality of the National Labor Relations Board Act (Act of July 5, 1935) pursuant to which the respondents are acting in the proceedings which the plaintiffs seek to enjoin.

Counsel have requested an opportunity to file briefs within three weeks and I have granted this request.

In the meantime I cannot see how harm will result to the defendants if the proceedings are allowed to remain in status quo until such time as I have had an opportunity to adequately consider the authorities cited in the arguments and the briefs of counsel.

If defendants prevail in their motions to dismiss, any injunctions now issued will be dissolved by order of court. Until such order, the defendants may be restrained by a temporary injunction to be issued in accordance with the prayer of each petition.

OPINION.

[JULY 22, 1936.]

BREWSTER, J. In this suit the Bethlehem Shipbuilding Corporation, Ltd. has asked for injunctive relief against threatened proceedings by the defendants, presuming to act by virtue of the Act of July 5, 1935, (Chap. 372; 49 Stat. 449) 29 U.S.C.A. 151-166, known as the National Labor Relations Act, hereinafter referred to as the Act. The defendants have filed motions to dismiss the bill for lack of jurisdiction.

Plaintiff's prayer for temporary injunction was presented on the bill and affidavits, from which I made a finding that the facts alleged were proved; that plaintiff would suffer irreparable injury, and that I was not persudaded that the plaintiff's remedies at law were complete and adequate. I ordered a temporary injunction, reserving, however, the right to dissolve it if, after considering the arguments and authorities cited by counsel, I decided that the injunction had been improvidently granted. At the same time, I heard arguments on defendants' motion to dismiss. The disposition of this motion requires a summary of the facts alleged in the bill of complaint.

Commencement of proceedings by the defendants under the Act, notice of hearing and subpoenas served upon the plaintiff are alleged.

The plaintiff is a Delaware corporation, owning and operating a shipbuilding plant at Quincy, Massachusetts, known as the Fore River Plant. This plant and its equipment is fully described in the bill. The plaintiff is engaged in the business of designing and building vessels of various kinds under specific contracts and employs approximately 5,000 employees. It fabricates substantially all materials used in the building of vessels, and for the most part builds

boilers and main propelling machinery for each vessel. The vessels are delivered at the Fore River Plant. The cost of materials represents less than one-half the entire cost of the vessel.

A copy of the complaint issued by the National Labor Relations Board is attached to the bill of complaint, from which it appears that the plaintiff is charged by the Industrial Union of Marine & Shipbuilding Workers of America, Local No. 5, with indulging in practices declared unfair by the Act, in that it seeks to dominate and interfere with an organization of plaintiff's employees, known and herein referred to as Employees' Plan of Representation.

The bill then sets forth in detail the consequences that will flow from the investigation instituted by the defendants. These may be summarized as follows:

That such proceedings will work harm to its reputation both with the public and with its employees; that they will inject strife into labor relations, now harmonious; that they will entail expense; that they will involve an unwarranted examination into the books, records and affairs of the plaintiff, with the resultant disclosure of confidential information; that they will require attendance of employees at hearings and generally disrupt and interfere with the plaintiff's business. It is further alleged that failure to comply with any order of the defendants will subject it to heavy penalties, imposed by the Act, depriving the plaintiff of any opportunity to exercise its constitutional rights unless the Court affords relief. It is also alleged that this investigation is a second attempt by the same labor organization to sustain charges of unfair practice against this plaintiff; that this earlier proceeding involved considerable loss of time, inconvenience, and a money outlay of over $15,000; that these proceedings were instituted by a Board, organized under earlier statutes, and that, after hearing, the Board denied the petition of the

Union and dismissed, as unfounded, the charges against the plaintiff.

The plaintiff asserts its right to maintain harmonious relations with its employees and to deal with them in respect of rates of pay, wages, hours of employment and other working conditions in a manner mutually satisfactory to it and to its employees, and that such right is of incalculable value to the plaintiff in the successful conduct of its business at the Fore River Plant.

The bill then sets out with much detail the organization of the Employees' Plan of Representation and its operation since its organization in 1923 and shows that, as late as March, 1936, an election was held in which 91.9% of the employees participated, whereby the officers of the Plant were elected without interference by the plaintiff.

It is alleged further that the relations existing between the plaintiff and its employees at said Plant do not constitute interstate commerce; nor do they burden and obstruct such commerce. Finally, it sets forth nine specific grounds upon which the plaintiff claims that the Act is unconstitutional, at least as applied to the situation existing in the Fore River Plant.

So far as the foregoing allegations are allegations of fact, they are admitted for the purposes of the motion to dismiss.

It is the defendants' contention that the Court has no power to grant relief on these facts, regardless of the question of the constitutionality of the Act. They cite numerous cases wherein equitable relief has been denied in proceedings somewhat similar, brought against the Labor Board or its agents. In some of these cases it is quite apparent that the

Court acted upon, or indulged, the presumption that the Act was a valid enactment. (1)

In one case I find the Court concurred in defendant's argument that the Court was powerless to intervene if the Act was unconstitutional. (2)

These cases I am unable to follow. Rather, I am in accord with those cases where temporary injunctions have issued against proceedings by the Board or its representatives. (3)

It is to be noted that many of the cases cited by defendant's attorney were decided before the decision had come down in the case of *Carter* v. *Carter Coal Co.* (Decided by the Supreme Court May 18, 1936). There were a number of cases cited arising in the District of Columbia in which the Supreme Court refused relief. (4)

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(1)
Precision Castings Co. v. *Boland et al.*, W.D. N. Y., Mar. 6, 1936;
Bemis Bro. Bag Co. v. *Feidelson*, 13 F. Supp. 153;
DuPont de Nemours & Co. v. *Boland*, W.D. N. Y., Mar. 25, 1936;
Blood & Co. Inc. v. *Madden et al.*, E.D. Pa., Mar. 9, 1936;
Joel et al. v. *Rosseter et al.*, N.D. Calif., Apr. 14, 1936;
Associated Press v. *Herrick*, S.D. N. Y., Mar. 17, 1936;
Alex Smith & Sons Carpet Co. v. *Herrick*, S.D. N. Y., May 6, 1936;
See also
National Labor Relations Board v. *New England Transp. Co.*, 14 F. Supp. 497.
On facts presented, no irreparable injury shown, but motion to dismiss denied.
Bethlehem Shipbuilding Corp. Ltd. v. *Nylander*, S.D. Calif., Apr. 3, 1936.

(2)
Buchsbaum & Co. v. *Beman*, N.D. Ill., Apr. 15, 1936;
Contra *Bendix Products Corp.* v. *Beman*, N.D. Ill., Mar. 24, 1936, 14 F. Supp. 58.

(3)
Vernor Co. v. *Bowen*, E.D. Mich., Dec. 14, 1935;
Stout et al. v. *Pratt*, 12 F. Supp. 864;
Infants Socks Inc. v. *Clark et al.*, E.D. Wis., Feb. 1, 1936;
Lindemann & Hoverson v. *Clark et al.*, E.D. Wis., Feb. 1, 1936;
Marathon Electric Co. v. *Clark et al.*, E.D. Wis., Feb. 1, 1936;
J. I. Case Co. v. *Clark et al.*, E.D. Wis., April 11, 1936;
Iowa Mfg. Co. v. *Beman*, N.D. Iowa, Feb. 2, 1936;
El Paso Elec. Co. v. *Elliot et al.*, W.D. Texas, June 10, 1936.

(4)
Heller Bros. Co. v. *Lind*, Eq. 60,593;
Lawrence Leather Co. v. *Madden*, Eq. 60,611;
Brown Shoe Co. Inc. v. *Madden*, Eq. 60,650;
Beaver Mills v. *Madden*, Eq. 60,507;
Echols v. *Madden*, Eq. 60,267.

Since the Carter case, and on the authority of it, the United States Court of Appeals for the District of Columbia has granted injunctions in these cases and others against the Labor Board, now pending before that court. So far as the authorities cited sustain the proposition that a plaintiff who questions the constitutionality of the statute cannot invoke the powers of an equity court for the sole purpose of testing the validity of the Act, I am in accord.

But I cannot agree that the Court is without power to prevent the execution of a void statute when proceedings under it will involve loss, injury and expense which cannot be restored, satisfied or compensated. In *Poindexter* v. *Greenhow*, 114 U. S. 270, the Court notes the distinction between the sovereignty and the government of it and stresses the point that when the government acts within the sphere of its agency it is a perfect representative "but outside of that, it is a lawless usurpation". The defendants' argument comes to this, that a Court convinced that the threatened acts of the defendants will constitute "lawless usurpation" must stand aside and permit the usurpation to proceed to an order of the Labor Board which the Court ultimately must declare null and void. I am not yet ready to concede that the equity powers of this court are thus limited.

Assuming for the moment that the Act is declared unconstitutional, the defendants then, without any authority or warrant of law, will attempt an investigation into the affairs of the plaintiff and the organization of its employees, subpoenaing employees as witnesses, examining books and records, disrupting the work at the plaintiff's plant, creating uncertainty, apprehension and unrest among the employees. These are alleged as unavoidable results of the interference by government agencies, if the investigation is allowed to proceed to a conclusion. There can be no doubt that, to some extent, expenses will have been incurred, loss will have been sustained, and damage will have been done by this illegal

invasion of the plaintiff's rights. The danger threatened is immediate and great. No one can foresee the extent of the consequences that will follow, but whatever they may be they will be irreparable since the law can give no redress. The equity court has jurisdiction to interpose its power to prevent a threatened invasion of the property rights of the plaintiff.

Ricker Rice Mills, Inc. v. *Fontenot,* 297 U. S. 110;
Village of Euclid v. *Ambler Realty Co.,* 272 U. S. 365;
Stout v. *Pratt,* 12 F. Supp. 864;
Bendix Products Corp. v. Beman et al., 14 F. Supp. 58.

It is no answer that the Act provides for judicial review. The remedies of the Act fall with the other provisions of the Act, if it be held unconstitutional in toto. In any event, plaintiff is left with no adequate or complete remedy at law.

El Paso Electric Co. v. Elliot et al.; W. D. Texas, June 10, 1936;
Terrace v. *Thompson,* 263 U. S. 197;
Bendix Products Corp. v. *Beman,* supra.

I am influenced somewhat by the fact that the proposed investigation was not started in response to any request by plaintiff's employees, or by a labor organization with which its employees are affiliated. No harm can come from staying the proceeding under the Act until it has been finally determined that the defendants are not unlawfully trespassing upon the rights of the plaintiff.

As was said in *Denver & R. G. R. Co.* v. *United States,* 124 F. 156:

"The case falls well within the established rule that a preliminary injunction maintaining the status quo may

properly issue whenever the questions of law or of fact to be ultimately determined are grave and difficult, and injury to the moving party will be immediate, certain, and great if it is denied, while the loss or inconvenience to the opposing party will be comparatively small if it is granted."

Were the balance of the equity otherwise, the court would not be powerless to act.

In *Nashville, C. & St. L. R. Co.* v. *McConnell,* 82 F. 65, a preliminary injunction was granted, and during the course of the opinion the Court observed:

"Indeed, as has been, in substance, said in other cases, the very fact that a right has been violated, and that this violation is constantly going on, and that a court of law cannot, in damages, compensate the injury or stop the wrong, furnishes the best possible reason for interference, by court of equity; and the fact that an actual injury resulting from the violation of a right is small, and the interest to be affected by an injunction large, is not to weigh against the interposition of preventive power in equity, when it is clear that on one hand a right is violated, and on the other a wrong committed. * * * ."

Nevertheless, the preventive powers in equity in these cases ought not to be exerted so as to interfere with the duties of those charged with executing a statute, if the Court is in doubt respecting the authority of such agencies. For that reason I deem it necessary to examine the law and the adjudications of the Supreme Court in order to determine if any such doubt is justified.

The Labor Act has been declared unconstitutional, as

applied to the employer-employee relation existing in the manufacturing industry.

Stout v. *Pratt*, supra;
Bendix Products Corp. v. *Beman*, supra;
National Labor Relations Board v. *Jones & Laughlin Steel Corp.* (C.C.A. 5, June 15, 1936).
Fruehauf Trailer Co. v. *National L. R. Board*, (C.C.A. 6., June 30, 1936.

In view of the recent decisions of the Supreme Court rendered in the case of *Schechter Corporation* v. *United States*, 295 U. S. 495, and *Carter* v. *Carter Coal Co.*, supra, there can be little doubt that the provisions and purposes of the Act lie outside the limits of the grant to the central government. It must be conceded that the Act purports to be an exercise of the power of Congress to regulate commerce between the states.

In an attempt to bring it within the ambit of the Commerce Clause (Art. 1, Sec. 8, Clause 3) there have been incorporated in the Act declaration of policy and Congressional findings. These findings and policies are set forth in the first section of the Act. In substance, so far as material to the present inquiry, it is said that:

> "The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent "or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow

of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or obstruct the market for goods flowing from or into the channels of commerce."

It is further found that the inequality of bargaining powers between employees and employers tends to depress the purchasing power of wage earners in industry and thereby substantially burdens and affects the flow of commerce.

If this declaration of purpose and Congressional findings were to control, the result would be to extend the commerce powers to all manufacturing activities whenever the raw material is imported or the finished product exported from the state where the manufacturing takes place. That the power of Congress over interstate commerce may not be thus extended is no longer open to debate. In the Agricultural Adjustment Act (Act of May 12, 1933, ch. 25; 48 Stat. 31), there was a declaration that the reduced purchasing power of farmers had burdened and obstructed the normal current of commerce. When the Act came before the Supreme Court to test its constitutionality, it was observed in the opinion that the government did not attempt to uphold the validity of the Act upon the basis of the Commerce Clause. *United States* v. *Butler*, 297 U. S. 1.

Again, in the National Industrial Recovery Act (Act of June 16, 1933; 15 U.S.C.A. 701) Congress declared it to be its policy to "remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof" and to "maintain united action of labor and management under adequate governmental sanctions and supervision" and to "improve standards of labor, and otherwise to rehabilitate industry • • • ."

A code of fair competition, set up under the Act to effec-

tuate the declared purpose, contained provisions relative to wages and the hours of employees employed in slaughter houses of a poultry dealer. The constitutionality of the Act, upon which this code was based, came before the Court in *Schechter Corporation* v. *United States,* 295 U.S. 495.

Referring to the labor provisions and their effect upon interstate commerce, the Court held that they did not directly affect such commerce so as to subject these relations to federal regulation.

The distinction between direct and indirect effect of intra-state transactions upon interstate commerce, and the importance of it in determining constitutionality of legislation, was clearly pointed out and the authorities reviewed in the unanimous opinion of the Court in that case.

Finally, we have the more recent case of *Carter* v. *Carter Coal Company,* supra, which brought to the Court the so-called Bituminous Coal Conservation Act of 1935 (15 U.S.C.A. 801-827), the purpose of which, as declared by the title, was not only to stabilize the bituminous coal industry and thereby remove obstructions of interstate commerce, but declared that the right of mine workers to organize and collectively bargain for wages, hours of labor and conditions of employment, should be guaranteed in order to prevent wage cutting and disparate labor costs detrimental to fair interstate commerce, and, further, to avoid obstructions of interstate commerce that recur in industrial disputes over labor relations at the mine.

The Act contained provisions relating to labor. A Labor Board was created, upon which authority was conferred to adjudicate labor disputes and to determine whether an organization of employees was controlled or dominated by the employer; and subdivision (g) of part 3 provided in substance that when the representatives of more than half of the mine workers employed had agreed on the maximum hours

of labor, such agreement was binding upon all the code members.

So far as respects the policy of Congress to seek to prevent strikes and labor disputes with its effect upon interstate commerce, the Bituminous Coal Conservation Act of 1935 does not substantially differ from the declared policy in the National Labor Relations Act.

Referring to these declarations, the Court said, in the Carter case:

> "Certain recitals contained in the Act plainly suggest that its makers were of opinion that its constitutionality could be sustained under some general federal power, thought to exist, apart from the specific grants of the Constitution. The fallacy of that view will be apparent when we recall fundamental principles which, although hitherto often expressed in varying forms of words, will bear repetition whenever their accuracy seems to be challenged."

These recitals were said to be merely a preamble to the Act and did not constitute an exertion of the will of Congress but a recital of considerations which, "in the opinion of that body existed and justified the expression of its will in the present act."

It was also said that the declaration that the conditions described directly affected interstate commerce was a pure assumption.

After reviewing at some length the previous decisions of the Court with the view of defining anew the limitations upon the commerce powers of the federal government, the Court reached the question upon which, in my opinion, the constitutionality of the National Labor Relations Act must turn. In the course of the opinion, it is said:

> "One who produces or manufactures a commodity, subsequently sold and shipped by him in interstate

commerce, whether such sale and shipment were originally intended or not, has engaged in two distinct and separate activities. So far as he produces or manufactures a commodity, his business is purely local. So far as he sells and ships, or contracts to sell and ship, the commodity to customers in another state, he engages in interstate commerce. In respect of the former, he is subject only to regulation by the state; in respect of the latter, to regulation only by the federal government. *Utah Power & L. Co.* v. *Pfost,* 286 U.S. 165, 182. Production is not commerce, but a step in preparation for commerce, *Chassaniol* v. *Greenwood,* 291 U. S. 584, 587.

"We have seen that the word 'Commerce' is the "equivalent of the phrase 'intercourse for the purposes of trade'. Plainly, the incidents leading up to and culminating in the mining of coal do not constitute such intercourse. The employment of men, the fixing of their wages, hours of labor and working conditions, the bargaining in respect of these things—whether carried on separately or collectively—each and all constitute intercourse for the purposes of production, not of trade. The latter is a thing apart from the relation of employer and employee, which in all producing occupations is purely local in character." * * *

"A consideration of the foregoing, and of many cases which might be added to those already cited, renders inescapable the conclusion that the effect of the labor provisions of the act, including those in respect of minimum wages, wage agreements, collective bargaining, and the Labor Board and its powers, primarily falls upon production and not upon commerce; and confirms the further resulting conclusion that production is a purely local activity. It follows that none of these essential antecedents of production constitutes a trans-

action in or forms any part of interstate commerce. *Schechter Corp. v. United States, supra,* p. 542 et seq. Everything which moves in interstate commerce has had a local origin. Without local production somewhere, interstate commerce, as now carried on, would practically disappear. Nevertheless, the local character of mining, of manufacturing and of crop growing is a fact, and remains a fact, whatever may be done with the products."

Again, to quote from the opinion:

"Much stress is put upon the evils which come from the struggle between employers and employees over the matter of wages, working conditions, the right of collective bargaining, etc., and the resulting strikes, curtailment and irregularity of production and effect on prices; and it is insisted that interstate commerce is *greatly* affected thereby. But, in addition to what has just been said, the conclusive answer is that the evils are all local evils over which the federal government has no legislative control. The relation of employer and employee is a local relation. At common law, it is one the domestic relations. The wages are paid for the doing of local work. Working conditions are obviously local conditions. The employees are not engaged in or about commerce, but exclusively in producing a commodity. And the controversies and evils, which it is the object of the act to regulate and minimize, are local controversies and evils affecting local work undertaken to accomplish that local result. Such effect as they may have upon commerce, however extensive it may be, is secondary and indirect. An increase in the greatness of the effect adds to its importance. It does not alter its character."

It is obvious, from the terms of the Act, that it was not the intention of Congress to limit the authority of the Labor Board to deal with employer-employee relations of those actually engaged in operating instruments of interstate commerce, but rather to extend that authority to those engaged in the production by manufacture or otherwise. This is clearly shown from the preamble, and also from definitions of the term "employee" and the term "affecting commerce" appearing in section 2 of the Act. The term "employee" included all employees except agricultural laborers and domestic servants or an individual employed by his parent; and the term "affecting commerce" means in commerce or burdening or obstructing commerce or the free flow of commerce or having led, or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

The legislation is based upon some theory that the relationship between a manufacturer and his employees is caught in the current of interstate commerce, or that a disturbance of such relationship will affect the free flow of commerce.

The result of the recent cases considered is to compel this court to dismiss such a theory as an adequate basis for extending the commerce powers to the regulation of plaintiff's labor situation. That has been definitely placed by these decisions beyond the regulatory power of the federal government.

It is argued that the Act finds support in cases like *Swift & Co. v. United States*, 196 U. S. 375; *Stafford* v. *Wallace*, 258 U. S. 495; *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, in which legislation regulating local activities was upheld but, as was pointed out in the Carter case, these cases rested "upon the circumstance that the acts in question constituted direct interferences with the 'flow' of commerce among the states." *Carter* v. *Carter Coal Co., supra,* (at page 127).

The situation presented in these cases involves focal points through which the stream of commerce passed from

producer to consumer without changing the character or identity of the commodity. Thus, in the Stafford case, the Court said:

> "The stockyards are but a throat through which the current flows, and the transactions which occur therein are only incident to the current from the West to the East, and from one State to another. Such transactions cannot be separated from the movement to which they contribute and necessarily take on its character."

Compare *Arkadelphia Milling Co.* v. *St. Louis S. W. Ry. Co.*, 249 U. S. 134.

Defendants also rely upon cases arising under anti-trust laws, such as *Coronado Coal Co.* v. *United Mine Workers of America*, 268 U. S. 295; *Bedford Company* v. *Stone Cutters Asso.*, 274 U. S. 37; *Local* 167, *International Brotherhood of Teamsters* v. *United States*, 291 U. S. 293.

These cases were held inapposite in the Carter case, and it is not necessary to repeat here the grounds of distinction assigned by the Court in that case. Because the Supreme Court upheld the Railway Labor Act of 1926 in *Texas & N. O. R. R. Co.* v. *Railway Clerks*, 281 U. S. 548, it is argued that the National Labor Relations Act of 1935 should be sustained. It is not difficult, however, to see that a strike among employees of an interstate carrier would have a direct effect upon interstate commerce, if it resulted in an interruption of service. The real question involved in that case was whether the lower court had properly exercised its power to punish for contempt a railroad which had refused to comply with its decree. It is to be noted that, during the course of the opinion in that case, the Court, in dealing with the power to regulate commerce, said that the power to regulate commerce was the power to enact all appropriate legislation for its protection and advancement, and that, in exercising

this authority, the government had power to facilitate the amicable settlement of disputes which threatened the service of *necessary agencies of interstate transportation.* (Italics supplied). A strike in the plaintiff's plant, of course, would not involve the service of a "necessary agency of interstate commerce".

Decisions have been handed down over a considerable period of time which are wholly consistent with the view that such direct effect would not flow from a labor disturbance between a manufacturer and his employees.

Coe v. *Errol,* 116 U. S. 517;
United States v. *E. C. Knight Co.,* 156 U. S. 1;
Hopkins v. *United States,* 171 U. S. 578;
Hammer v. *Dagenhart,* 247 U. S. 251;
United Mine Workers of America v. *Coronado Coal Co.,* 259 U. S. 344;
Heisler v. *Thomas Colliery Co.,* 260 U. S. 245;
United Leather Workers v. *Herkert,* 265 U. S. 457.

The case last cited affords a good illustration of the application of the rule to a labor dispute. In that case an employer sought to enjoin an organization of employees from illegal picketing and other interference with the employer's manufacturing and interstate business and with its employees, or would-be employees, engaged in carrying it on. These acts of the employees were charged to be in violation of the anti-trust laws by unduly restraining interstate commerce. In denying equitable relief to the employer, Chief Justice Taft made this statement:

> "The sole question here is whether a strike against manufacturers by their employees, intended by the strikers to prevent, through illegal picketing and intimidation, continued manufacture, and having such effect, was

a conspiracy to restrain interstate commerce under the Anti-Trust Act because such products when made were, to the knowledge of the strikers, to be shipped in interstate commerce to fill orders given and accepted by would-be purchasers in other States, in the absence of evidence that the strikers interfered or attempted to interfere with the free transport and delivery of the products when manufactured from the factories to their destination in other States, or with their sale in those States."

After reviewing the decisions pertinent to that inquiry, the Court came to the conclusion that the acts of the defendant employees in that case did not directly interfere with interstate commerce, the Court observing:

"The record is entirely without evidence or circumstances to show that the defendants in their conspiracy to deprive the complainants of their workers were thus directing their scheme against the interstate commerce. It is true that they were, in this labor controversy, hoping that the loss of business in selling goods would furnish a motive to the complainants to yield to demands in respect to the terms of employment; but they did nothing which in any way directly interfered with the interstate transportation or sale of the complainants' products."

Whether the Act is unconstitutional in toto, or whether the regulatory powers conferred by the Act may be exerted within a limited field, are questions which do not necessarily call for decision in the instant case. If the Act is to be construed so as to extend these powers to plaintiff, it clearly is beyond the power of Congress. On the allegations of the bill the Board or its representative have no authority in the

premises, and Congress is not endowed with power to confer such authority.

National Labor Relations Board v. *Jones & Laughlin, supra;*

Fruehauf Trailer Co. v. *National Labor Relations Board,* supra.

I agree with the United States attorney that the members of the Labor Board in their official capacity are not before the court in these proceedings. *N. E. Transp. Co.* v. *Meyers,* (D. C. Mass. March 29, 1936). I treat the proceedings as against individuals, who have been duly served with process, who are threatening to act under color of a statute which is invalid. I have no doubt respecting the jurisdiction of this court to entertain a suit against the defendants as individuals.

Ex parte Young, 209 U. S. 123;

Sterling v. *Constantin,* 287 U. S. 378;

Worcester County Trust Co. v. *Long,* 14 F. Supp. 754, 758.

The defendants' motion to dismiss is denied.

ASSIGNMENT OF ERRORS.

[FILED JUNE 26, 1936.]

And now, on this 26th day of June, 1936, come the defendants A. HOWARD MYERS, individually and as Acting Regional Director for the First Region, EDMUND J. BLAKE, individually and as Regional Attorney for the First Region, and DANIEL M. LYONS, individually and as Trial Examiner designated or to be designated by the National Labor Relations Board, by their attorneys Charles Fahy and Robert B. Watts, and say that the judgment and decree entered in the above case on May 28, 1936, is erroneous and unjust to the defendants for the following reasons:

1. The Court erred in finding the facts alleged in the plaintiff's bill of complaint to be true.

2. The Court erred in failing to find that the defendants have no power and have not threatened to exercise any power to enforce subpoenas issued by the National Labor Relations Board or its members.

3. The Court erred in failing to find that the enforcement of subpoenas of the National Labor Relations Board or its members may be had only by an appropriate proceeding in the United States District Court, after notice, hearing and judicial determination of all of the facts.

4. The Court erred in finding that no damage, inconvenience or loss of rights will be suffered by any person if hearings and proceedings under the National Labor Relations Act are postponed until the determination of the defendants' motion to dismiss the bill of complaint.

5. The Court erred in concluding as a matter of law that there is grave doubt as to the constitutionality of the National Labor Relations Act.

6. The Court erred in failing to conclude as a matter of law that the administrative steps provided for by the National Labor Relations Act do not infringe any of the Constitutional protection to which the plaintiff is entitled.

7. The Court erred in concluding as a matter of law that the plaintiff will suffer irreparable damage if any hearings are held for the purpose of determining whether or not the plaintiff has engaged, at its Fore River Plant, in any so-called "unfair labor practices" under the National Labor Relations Act, or if any proceeding or action is taken with respect thereto.

8. The Court erred in failing to find and conclude that the damage of the kinds alleged in the bill of complaint is not irreparable damage cognizable in equity.

9. The Court erred in failing to conclude as a matter of law that plaintiff has a plain, adequate and complete remedy under the terms of the National Labor Relations Act.

10. The Court erred in failing to conclude that the facts presented did not state grounds for equity jurisdiction.

11. The Court erred in failing to conclude that the facts presented did not state grounds for equitable relief.

12. The Court erred in failing to find that A. Howard Myers is Acting Regional Director of the First Region of the National Labor Relations Board, and has only those powers delegated by the rules and regulations of the National Labor Relations Board.

13. The Court erred in failing to find that Edmund J. Blake is Regional Attorney for the First Region of the National Labor Relations Board, and has only those powers delegated by the rules and regulations of the National Labor Relations Board.

14. The Court erred in failing to find that Daniel M. Lyons is Trial Examiner for the National Labor Relations

Board, and has only those powers delegated by the rules and regulations of the National Labor Relations Board.

15. The Court erred in failing to find that the National Labor Relations Board is composed only of J. Warren Madden, John M. Carmody and Edwin S. Smith, whose offices and official residences are in the City of Washington, District of Columbia, without the jurisdiction of this Court.

16. The Court erred in that it failed to find that the exclusive jurisdiction to review the action of the National Labor Relations Board is vested in the appropriate United States Circuit Court of Appeals after all of the facts have been developed by the National Labor Relations Board in accordance with the terms of the National Labor Relations Act.

17. The Court erred in that it failed to find that the determination of the constitutional and jurisdictional questions must be made in accordance with the terms of the National Labor Relations Act, subject to review by the appropriate United States Circuit Court of Appeals.

18. The Court erred in that it failed to find that the defendants A. Howard Myers, Edmund J. Blake and Daniel M. Lyons are not acting as the National Labor Relations Board and have no power to issue any orders against this plaintiff or enforce any orders of the National Labor Relations Board against this plaintiff in the event any such order or orders are issued.

19. The Court erred in that it failed to find that the plaintiff is not threatened with any immediate harm or injury, and that the question of whether or not the National Labor Relations Board will issue any order against this plaintiff is a matter for future determination.

WHEREFORE the defendants pray that the said decree may be reversed, and the District Court for the District of

Massachusetts be directed to dissolve the temporary injunction hereinbefore issued and dismiss the bill of complaint and deny the petition for declaratory judgment.

CHARLES FAHY,
ROBERT B. WATTS,
Attorneys for the Defendants.

ORDER STAYING PROCEEDINGS PENDING APPEAL.

July 13, 1936.

It appearing to the court that an appeal has been taken to the United States Circuit Court of Appeals from an order entered herein on May 28, 1936, granting a preliminary injunction, it is

Ordered that all proceedings herein be held in abeyance pending the determination of said appeal and the time within which the defendants are required to move or plead further herein is hereby extended for a period of thirty days from the date of the determination of said appeal.

ELISHA H. BREWSTER,
United States District Judge.

DEFENDANTS' PRAECIPE.

[Filed July 3, 1936.]

To the Clerk of said Court:

You will please include in the record on appeal in the above-entitled cause the following instruments filed in the said cause, together with the exhibits herein mentioned:

April 27, 1936: Bill of Complaint for Restraining Order and Injunction and Petition for Declaratory Judgment.

April 27, 1936: Subpoena in Equity Issued and Marshal's Return thereon.

April 27, 1936: Temporary Restraining Order issued and Marshal's Return thereon.

April 27, 1936: Rule to Show Cause why Temporary Injunction should not be issued and Marshal's Return thereon.

May 4, 1936: Motion to Quash Subpoena. Special Appearance.

May 4, 1936: Return of A. Howard Myers, individually and as Acting Regional Director for the First Region, Edmund J. Blake, individually, and as Regional Attorney for the First Region, and Daniel M. Lyons, individually and as Trial Examiner of the National Labor Relations Board, designated or to be designated by the National Labor Relations Board.

May 1, 1936: Motion to Dismiss the Bill of Complaint, Dissolve Temporary Restraining Order, etc.

May 4, 1936: Order Continuing Temporary Restraining Order and Rule to Show Cause.

May 12, 1936: Affidavit of S. W. Wakeman.

May 12, 1936: Affidavit of W. H. Collins.

May 12, 1936: Affidavit of Earl L. Pratt.

May 12, 1936: Affidavit of A. B. Homer.

May 12, 1936: Affidavit of H. E. O. Gould.

May 14, 1936: Order continuing Temporary Restraining Order.

May 27, 1936: Memorandum Opinion.

May 28, 1936: Findings of Fact and Conclusions of Law.

May 28, 1936: Order granting Preliminary Injunction.

June 2, 1936: Temporary injunction and Marshal's Return thereon.

June 26, 1936: Recital of Filing of Petition for Appeal, Assignment of Errors, Recital of issuance of Citation, Order Staying Proceedings, Pending Appeal, Praecipe.

CHARLES FAHY,
ROBERT B. WATTS,
Attorneys for Defendants.

PLAINTIFF'S PRAECIPE.

[FILED AUGUST 4, 1936.]

To the Clerk of said Court:

You will please include in the record on appeal in the above-entitled cause the following instruments filed in the said cause: or in the suit docketed in said Court as Equity No. 4324:

May 12, 1936: Affidavit of Charles MacKenzie.
May 12, 1936: Affidavit of William Harvey.
May 12, 1936: Affidavit of William G. McDermott.
May 12, 1936: Affidavit of Mark Hannabury.
(all four being verified on May 12, 1936)
Affidavit of Thomas E. Barker (verified on May 13, 1936)
May 19, 1936: Supplemental affidavit of Thomas E. Barker.
May 19, 1936: Supplemental affidavit of William G. McDermott.
May 19, 1936: Supplemental affidavit of Charles MacKenzie.
(said three being verified on May 18, 1936)

This praecipe of the plaintiff, appellee.

CLAUDE R. BRANCH,
Solicitor of the plaintiff, appellee.

A citation on appeal was issued on June 26, 1936, being made returnable in the U. S. Circuit Court of Appeals on July 27, 1936. Service of said citation was duly acknowledged

by the attorney for the Bethlehem Shipbuilding Corporation, Ltd., on June 29, 1936.

AGREEMENT.

[Filed September 14, 1936.]

To the Clerk.

We hereby agree and request that in addition to the papers already specified in the praecipes of both parties as constituting the record on appeal in the above entitled case, the opinion of the Court dated July 22, 1936, be added and included.

CLAUDE R. BRANCH,
Attorney for Plaintiff.
ROBERT B. WATTS,
Attorney for Defendants.

Approved September 19, 1936.
ELISHA H. BREWSTER,
U. S. District Judge.

STIPULATION REGARDING RECORD.

[Filed September 17, 1936.]

It is stipulated and agreed by and between counsel in this case that no witnesses were called and that the case was heard entirely on the bill of complaint and petition of the plaintiff, the return and motion to dismiss of the defendants, and affidavits and exhibits as included in the record on appeal, and that the record on appeal, as prepared, contains everything upon which the Court heard the application for the preliminary injunction. For the foregoing reasons, no narrative form of evidence is submitted as described in Paragraph b of Equity Rule 75.

CLAUDE R. BRANCH,
Attorney for Plaintiff.
ROBERT B. WATTS,
Attorney for Defendants.

Approved September 19, 1936.
ELISHA H. BREWSTER,
U. S. District Judge.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
DISTRICT OF MASSACHUSETTS, ss.:

I, James S. Allen, Clerk of the District Court of the United States for the District of Massachusetts, do hereby certify that the foregoing is the transcript of the record on the appeal of the defendants, including true copies of such proofs, entries and papers on file as have been designated by the praecipes of both parties, and of the opinion dated July 22, 1936, included by stipulation of parties, in the cause entitled,

No. 4321, EQUITY DOCKET,

BETHLEHEM SHIPBUILDING CORPORATION, LTD.,
PLAINTIFF,

v.

A. HOWARD MYERS, EDMUND J. BLAKE AND DANIEL M. LYONS, INDIVIDUALLY AND AS THE NATIONAL LABOR RELATIONS BOARD,
DEFENDANTS,

now pending in said District Court.

And I further certify that transmitted herewith are the originals of the petition for appeal and the citation on appeal with the acknowledgment of service thereon.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court, at Boston, in said District, this 26th day of September, A. D. 1936.

JAMES S. ALLEN, CLERK.

[SEAL]

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

OCTOBER TERM, 1935.

No. 3190.

A. HOWARD MYERS ET AL.,
INDIVIDUALLY AND AS THE NATIONAL LABOR RELATIONS BOARD,
DEFENDANTS, APPELLANTS,

v.

CHARLES MacKENZIE ET AL.,
PLAINTIFFS, APPELLEES.

TRANSCRIPT OF RECORD OF DISTRICT COURT

No. 4324, EQUITY DOCKET.

CHARLES MacKENZIE, INDIVIDUALLY AND AS CHAIRMAN,
JAMES E. MANNING, INDIVIDUALLY AND AS VICE-CHAIRMAN,
THOMAS E. BARKER, INDIVIDUALLY AND AS SECRETARY
OF THE REPRESENTATION OF EMPLOYEES IN THE FORE
RIVER PLANT OF THE BETHLEHEM SHIPBUILDING
CORPORATION, LTD.,

PLAINTIFFS,

v.

A. HOWARD MYERS, EDMUND J. BLAKE AND
DANIEL M. LYONS, INDIVIDUALLY AND AS THE
NATIONAL LABOR RELATIONS BOARD,

DEFENDANTS.

The bill of complaint for restraining order and injunction and petition for declaratory judgment is filed in the

clerk's office on May 4, 1936, and is duly entered at the present March Term of this court, A. D. 1936, and is in the words and figures following:

BILL OF COMPLAINT.

[FILED MAY 4, 1936.]

[MEMORANDUM. Copy of bill of complaint is here omitted, as a substituted bill of complaint was subsequently filed and will be found hereafter recorded. JAMES S. ALLEN, CLERK.]

Upon the filing of the bill of complaint, the following restraining order and order of notice is entered:

RESTRAINING ORDER AND ORDER OF NOTICE.

May 4, 1936.

BREWSTER, J. Upon the filing of the bill of complaint duly verified, and it appearing that there is danger of irreparable injury to the plaintiffs from delay, it is

ORDERED that said A. Howard Myers, Individually and as Acting Regional Director for the First Region, National Labor Relations Board, and as National Labor Relations Board, and Edmund J. Blake, Individually and as Regional Attorney for the First Region, National Labor Relations Board, and as National Labor Relations Board, and Daniel M. Lyons, Individually, and as Trial Examiner of the National Labor Relations Board and as the National Labor Relations Board and each of them, and each of their assistants, employees, agents and representatives, and each of them, be and they hereby are restrained from holding or causing to be held any hearing or hearings for the purpose of determining whether the Bethlehem Shipbuilding Corporation, Ltd., or Charles MacKenzie, James E. Manning and Thomas E. Barker, Individually and respectively as Chairman, Vice Chairman and Secretary of Representation of Em-

ployees in Fore River Plant of the Bethlehem Shipbuilding Corporation, Ltd., plaintiffs in this action, have been or are engaged at the Plant of the Bethlehem Shipbuilding Corporation, Ltd., at Quincy and Braintree, in any violation of the National Labor Relations Act, and from undertaking any proceedings or taking any action whatsoever with respect thereto pending a hearing upon the prayers of the said plaintiffs until the further order of the Court.

And it is further ORDERED that the said plaintiffs give notice to said defendants to appear before this Court on Monday, May 4th, 1936, at two o'clock in the afternoon, at the Federal Building, Boston, Massachusetts, to show cause why a preliminary injunction should not issue in accordance with the prayers of said bill of complaint, and it is further

ORDERED that notice be given by the said plaintiffs by serving copies of this order upon the said defendants forthwith.

By the Court:
JOHN E. GILMAN, JR.,
Deputy Clerk.

May 4, 1936.
E. H. B.
D. J.

MARSHAL'S RETURN ON RESTRAINING ORDER.

UNITED STATES OF AMERICA,
DISTRICT OF MASSACHUSETTS, ss.:

Boston, May 4, 1936.

Pursuant hereunto, I have this day served the within Restraining Order and Order of Notice upon the within named A. Howard Myers, individually and as Acting Director for First Region, National Labor Relations Board, and Edmund J. Blake, individually and as Regional Attorney for the National Labor Relations Board, by giving to each of

them in hand at Boston, in said District, a true and attested copy thereof. And thereafter I made diligent seaach for the said Daniel M. Lyons, Trial Examiner for said Board and failed to find him within my District.

JOHN J. MURPHY, *U. S. Marshal.*
By: DANIEL L. HERLIHY,
Deputy U. S. Marshal.

Also on the same day, the following subpoena is issued:

SUBPOENA.

[ISSUED MAY 4, 1936.]

[SEAL]

UNITED STATES DISTRICT COURT.

DISTRICT OF MASSACHUSETTS:

THE PRESIDENT OF THE UNITED STATES OF AMERICA,

To A. HOWARD MYERS, *Individually, and as Acting Regional Director for the First Region, National Labor Relations Board, and as the National Labor Relations Board,* EDMUND J. BLAKE, *Individually, and as Regional Attorney for the First Region, National Labor Relations Board, and as the National Labor Relations Board, and* DANIEL M. LYONS, *Individually, and as Trial Examiner of the National Labor Relations Board designated or to be designated by the National Labor Relations Board, and as the National Labor Relations Board,*

GREETING:

YOU ARE HEREBY COMMANDED that all excuses and delays set aside you be and appear within twenty days after the service of this subpoena at the Clerk's office of the United States District Court for the District of Massachusetts, at Boston, to answer unto the bill of complaint of CHARLES MacKENZIE, individually and as Chairman, JAMES E. MANNING, Individually and as Vice Chairman,

and THOMAS E. BARKER, Individually and as Secretary of the Representation of Employees in the Fore River Plant of the Bethlehem Shipbuilding Corporation, Ltd. in said Court exhibited against you. Hereof you are not to fail at your peril, and have you then and there this writ.

WITNESS the Honorable ELISHA H. BREWSTER, United States District Judge at Boston, in said District, this fourth day of May, A. D. 1936.

JAMES S. ALLEN, *Clerk*,
By HELEN I. TWEEDY, *Deputy Clerk*.

MEMORANDUM.

The Defendants in this case are required to file their answers or other defense in the Clerk's office of said Court, on or before the twentieth day after service of this writ, excluding the day thereof; otherwise the Bill may be taken *pro confesso*.

Due return of service on said subpoena is made by the Marshal and is as follows:

OFFICER'S RETURN OF SERVICE OF SUBPOENA.

UNITED STATES OF AMERICA,
DISTRICT OF MASSACHUSETTS, ss.:

Boston,

I hereby certify and return, that on the 4th day of May, 1936, I received the within Subpoena in Equity. And thereafter on the same day I served the same upon the within named A. Howard Myers, individually and as Acting Regional Director for First Region, Natl. Labor Relations Board, and Edmund J. Blake, Individually and as Regional Attorney for the First Region, National Labor Relations Board by giving to each of them in hand at Boston, in said

District, a true and attested copy thereof. And thereafter on the same day I made diligent search for the said Daniel M. Lyons, Trial Examiner, and failed to find him within my District.

JOHN J. MURPHY,
United States Marshal.
By DANIEL L. HERLIHY,
Deputy U. S. Marshal.

Also on the said 4th day of May, A. D. 1936, the following special appearance is filed:

SPECIAL APPEARANCE OF ROBERT B. WATTS.

[FILED MAY 4, 1936.]

To the Clerk of the United States District Court for the District of Massachusetts:

You will please enter my special appearance as Attorney for A. Howard Myers, "National Labor Relations Board, and as the National Labor Relations Board", Edmund J. Blake, "National Labor Relations Board, and as the National Labor Relations Board," and Daniel M. Lyons, "as the National Labor Relations Board", so designated, and defendants in the above entitled cause.

Said special appearance is made for the sole purpose of objecting to the jurisdiction of this Court over said denominated defendants in the said above-named proceeding.

ROBERT B. WATTS,
Attorney appearing specially for A. Howard Myers, "National Labor Relations Board, and as the National Labor Relations Board", Edmund J. Blake, "National Labor Relations Board, and as the National Labor Relations Board", and Daniel M. Lyons, "as the National Labor Relations Board."

Also on the said 4th day of May, 1936, the Honorable Elisha A. Brewster, District Judge, sitting, this cause coming on to be heard on the aforementioned restraining order and the prayer for preliminary injunction, it is ordered that affidavits be filed within one week and counter affidavits thereafter, the restraining order to be continued in force to May 14, 1936.

On the 7th day of May, A. D. 1936, the following plaintiffs' motion to amend bill of complaint and substituted bill of complaint is filed, said bill of complaint being allowed by the court on May 11, 1936, defendant not objecting:

PLAINTIFFS' MOTION TO AMEND BILL OF COMPLAINT AND SUBSTITUTED BILL OF COMPLAINT.

[FILED MAY 7, 1936; ALLOWED MAY 11, 1936.]

CHARLES MacKENZIE, Individually and as Chairman,
JAMES E. MANNING, Individually and as Vice Chairman, and
THOMAS E. BARKER, Individually and as Secretary
of the Representation of Employees in the Fore River Plant of the Bethlehem Shipbuilding Corporation, Ltd.

Plaintiffs

—v—

A. HOWARD MYERS, Individually, and as Acting Regional Director for the First Region, National Labor Relations Board, and as the National Labor Relations Board,

EDMUND J. BLAKE, Individually, and as Regional Attorney for the First Region, National Labor Relations Board, and as the National Labor Relations Board, and

DANIEL M. LYONS, Individually, and as Trial Examiner of the National Labor Relations Board designated or to be designated by the National Labor Relations Board, and as the National Labor Relations Board,

Defendants

Now come the plaintiffs in the above entitled action and move to amend their bill of complaint by substituting therefor the following:

Substitute Bill of Complaint for Restraining Order and Injunction and Petition for Delaratory Judgment.

RESPECTFULLY REPRESENT the plaintiffs as follows:

1. The plaintiffs, Charles MacKenzie, James E. Manning and Thomas E. Barker, and each of them, are citizens of the United States and the Commonwealth of Massachusetts, and residents of Quincy, County of Norfolk, in said Commonwealth. The plaintiffs and each of them have been for several years, and are now, employees of the Bethlehem Shipbuilding Corporation, Ltd., employed at its plant located in Braintree and Quincy, County of Norfolk, Massachusetts, hereinafter referred to as the Fore River Plant.

2. The plaintiff, Charles MacKenzie, is Chairman, the plaintiff, James E. Manning, is Vice Chairman, and the plaintiff, Thomas E. Barker, is Secretary of the General Body, a group elected by and from all of the employees in the Fore River Plant and created and existing under a plan for the Representation of Employees in the Fore River Plant of the Bethlehem Shipbuilding Corporation, Ltd. The plaintiffs bring this bill in their own behalf, and in their several capacities as officers of the General Body in behalf of all of the employees of the Fore River Plant under the authority and by votes of the General Body of the Representation of Employees, a copy of which vote is hereto annexed and marked "A", and is prayed to be taken as a part hereof. The plaintiffs bring this bill of complaint for a restraining order and injunction, and for a declaratory judgment against the defendants named herein.

3. This suit arises under the Constitution and Laws of the United States, and involves the construction, application, validity and enforcement of an Act of Congress of July, 1935,

known as the National Labor Relations Act Public Number 198, U. S. C. Title 29, Sections 151-166. The amount in controversy herein exceeds the sum of Three Thousand ($3,000) Dollars, exclusive of interest and costs.

4. Said National Labor Relations Act, among other things, provides for the appointment of a board to be known as the National Labor Relations Board. Acting under the supposed authority of said Act, the President appointed J. Warren Madden as Chairman and member, and John M. Carmody and Edwin S. Smith as members of said Board, and said persons having been duly qualified, are now purporting to act as the National Labor Relations Board. Said Madden, Carmody and Smith are citizens of the United States. Said Madden is a citizen of the Commonwealth of Pennsylvania; said Carmody is a citizen of the State of New York; and said Smith is a citizen of the Commonwealth of Massachusetts. Said Madden, Carmody and Smith would appear to be proper parties defendant herein, but are not necessary parties defendant herein, and are not named parties defendant because, as the plaintiffs are advised, they are not personally within the jurisdiction of this Honorable Court. Although said Madden, Carmody and Smith have not been named as parties defendant herein for the foregoing reason, the plaintiffs desire to have them granted the right to become parties defendant herein, with all of the rights of parties defendant, and not limited to an appearance before this Court as *amici curiae*, or in any other capacity with rights inferior to those of actual parties defendant herein.

5. The defendant, A. Howard Myers, is a citizen of the United States and of the Commonwealth of Massachusetts, and is resident in said Commonwealth. He is the Acting Regional Director for the First Region (which includes said Braintree and Quincy), National Labor Relations Board, having been appointed by said Board, and is purporting to

act under and by the authority of said Board and the National Labor Relations Act. The said defendant is now acting as and for the National Labor Relations Board, and is the agent of the Board in this Commonwealth, and is charged with the prosecution of inquiries, investigations and complaints, and in general the administration of the Act in Massachusetts. He is here sued individually and as Acting Regional Director, and as the National Labor Relations Board.

6. The defendant, Edmund J. Blake, is a citizen of the United States, and of the Commonwealth of Massachusetts, and is resident in said Commonwealth. He has been appointed and is now acting as Regional Attorney for the First Region, National Labor Relations Board, having been designated as such by the Board. He purports to act under and by authority of the National Labor Relations Act. The said defendant is now acting as and for the National Labor Relations Board, and is the agent of the Board in this Commonwealth, and is charged with the prosecution of inquiries, investigations and complaints, and in general, the enforcement of said Act in Massachusetts. He is here sued individually and as Regional Attorney for the First Region and as the National Labor Relations Board.

7. The plaintiffs are informed and believe, and therefore aver, that the defendant, Daniel M. Lyons, is a citizen of the United States and of the Commonwealth of Massachusetts, and is resident in said Commonwealth. Said Daniel M. Lyons has been appointed by the National Labor Relations Board as Trial Examiner in the proceedings scheduled for hearing on April 27, 1936, more specifically referred to hereinafter. Said defendant purports to be acting under and by authority of the National Labor Relations Act. The said defendant is now acting as and for the National Labor Relations Board, and is the agent of the Board in this Commonwealth, and is charged with the prosecution of inquiries and

investigations, and with the conduct of hearings under said Act, and in general, with the enforcement of said Act in Massachusetts. He is here sued individually and as Trial Examiner for the First Region and as the National Labor Relations Board.

8. The Bethlehem Shipbuilding Corporation, Ltd. is a corporation organized and existing under the laws of the State of Delaware and is a citizen of the United States and of the State of Delaware and owns and operates a plant, herein referred to as the Fore River Plant, in Quincy and Braintree, in said Norfolk County, Massachusetts. It is engaged in the business of designing and building vessels and employs at its Fore River Plant approximately 5,000 persons in such business.

9. Each of the plaintiffs and every other employee whom they represent, is working under an oral employment contract between the Bethlehem Shipbuilding Corporation, Ltd., and himself and herself, which contracts govern rates of pay, wages and hours of employment. Said contracts of employment between the Bethlehem Shipbuilding Corporation, Ltd., and each of these plaintiffs, and the other employees of the Fore River Plant was entered into and have been and are to be performed entirely within the Commonwealth of Massachusetts and the substantive rights thereunder of the parties thereto are governed by the laws of said Commonwealth.

10. Since March 1, 1923, there has been in effect in the Fore River Plant of the Bethlehem Shipbuilding Corporation, Ltd., a plant for the representation of employees hereinafter called the Plan. This Plan provides a method by which the employees bargain with the Bethlehem Shipbuilding Corporation, Ltd. with respect to rates of pay, wages, hours of employment, and working conditions, and provides a means for the adjustment of controversies which may arise.

Under this Plan each of the employees of the Fore River Plan participate in the election from among the employees, of representatives who constitute what is known as the General Body, the members of which negotiate with the management of the Corporation on all questions concerning the rates of pay, wages, hours of employment and working conditions. The members of the General Body are nominated and elected annually by the employees, the last election having been held on March 13, 1936. As a result of that election, the plaintiff, Charles MacKenzie, was elected Chairman, the plaintiff, James E. Manning, Vice Chairman, and the plaintiff, Thomas E. Barker, Secretary of the General Body by the employees.

11. Prior to the adoption of the Plan in 1923, there were frequent walk-outs and interruptions in regular employment and production in the Fore River Plant due to controversies arising between the employees and the management of said Plant. Since the adoption of the Plan there has been steady employment and continuous operation of the Fore River Plant, and there has developed and there now exists harmonious relations between the employees and the management. This has been the direct result of the operation of the Plan. At the last election held on March 13, 1936, ninety six per cent. of the employees in the Fore River Plant eligible to vote participated in the election of the employees' representatives who constitute the General Body. All employees who have been on the pay roll of the Corporation for over sixty days prior to the election and are eighteen years of age are eligible to vote in the elections except officials of the Corporation and persons having the right to recommend the hiring and discharge of employees.

12. The National Labor Relations Act provides in Sections, 7, 8 (1) and (2) and Section 10 (a) as follows:

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organiza-

tions, to bargain collectively, through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

"Sec. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 of this title.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

"Section 10 (a). The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section (8) affecting commerce). This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law or otherwise."

13. Some time during the month of April, 1936, representatives of the Industrial Union of Marine and Shipbuilding Workers of America made charges alleging that the Bethlehem Shipbuilding Corporation, Ltd., was engaged in and engaging in certain unfair labor practices affecting commerce as defined and set forth in the National Labor Relations Act with the National Labor Relations Board, as a result of which a complaint and notice of hearing signed

by the defendant, A. Howard Myers, as acting Regional Director of the First Region of the National Labor Relations Board was served upon the Bethlehem Shipbuilding Corporation, Ltd. In signing said complaint and notice of hearing, said defendant Myers, as stated therein, was acting as agent of the National Labor Relations Board.

14. On information and belief, the plaintiffs state that said complaint and notice of hearing recited that charges had been theretofore filed with the National Labor Relations Board by said Industrial Union of Marine and Shipbuilding Workers of America, alleging that said Bethlehem Shipbuilding Corporation, Ltd., at its plant at said Quincy and Braintree, was dominating and interfering with the Representation of Employees and contributing financial and other aid to said Plan in violation of Section 8, Clauses 1 and 2, and Section 2, Clauses 6 and 7 of the National Labor Relations Act.

15. On information and belief, the plaintiffs further say that said complaint and notice of hearing further recited that said acts constituted unfair labor practices affecting commerce, and that said notice of hearing was, therefore, given that pursuant to the rules and regulations of said Board, on the 27th of April, 1936, at 10 o'clock in the forenoon, in Room 1309 Federal Building, Boston, Massachusetts, a hearing would be conducted before the National Labor Relations Board by a trial examiner, to be designated by it in accordance with its rules and regulations upon the complaint.

16. Thereafter, the National Labor Relations Board, designated by its order, the defendant, Daniel M. Lyons, as trial examiner to conduct said hearing.

17. The plaintiffs, being satisfied with the contracts of employment which they now have with the said Bethle-

hem Shipbuilding Corporation, Ltd., desire that no change be made in their status, and therefore, desire no interference by the National Labor Relations Board. The body described as The General Body of the Representation of Employees in the plant of the Bethlehem Shipbuilding Corporation, Ltd., is the representative of all employees in dealing with their employer, and said employees have no desire to alter the representation of employees plan now in effect, but on the contrary, desire to retain their individual rights and freedom in respect of bargaining with their employer in all matters relating to or affecting their employment under the present plan.

18. Your plaintiffs are informed and believe, and therefore, aver that should the representation of employees in the plant of the Bethlehem Shipbuilding Corporation, Ltd., as now formed, be altered, trouble will follow, with the result that the plant will close, thereby affecting the plaintiffs and depriving them of their employment, and will result in labor disturbances which will affect the entire community.

19. The action of the National Labor Relations Board in issuing the complaint aforesaid and holding the hearing will discredit the Representation of Employees Plan and deprive the employees of the right to negotiate with the Bethlehem Shipbuilding Corporation, Ltd., through the operation of the Plan. The employees will be prevented from using the method of their choice, proven by years of operation and developed from long experience, to bargain with their employer.

20. The plaintiffs have no means of protecting their existing employment, the terms of their employment contracts and their rights to bargain with their employer under the existing plan and to avert the consequences which will result from any action by the National Labor Relations Board except by preventing the holding of the hearing under

said Act; and in order to prevent the holding of said hearing, it is necessary that the National Labor Relations Board be enjoined from attempting to carry out the provisions of the Act.

21. The damage which will accrue to the plaintiffs by reason of their being deprived of their rights or any of them as herein alleged, while irreparable, is not ascertainable in pecuniary value, and they would be unable to prove the amount or amounts thereof in any court of law, and are, therefore, without a plain, adequate, complete or timely remedy at law.

22. The plaintiffs are advised, and therefore, aver that the National Labor Relations Act is illegal and void in that it violates the Constitution of the United States in the following as well as other respects:

(a) The said Act is in purpose, in essence and on its face an attempt to regulate matters not committed to the Federal Government by the Constitution, by regulating industry, including the relations between employer and employee, in respect to rates of pay, wages, hours of employment and other conditions of employment.

(b) The said Act is violative of the Commerce Clause in that it seeks to regulate matters concerning wholly intrastate business, regulation which does not constitute the regulation of commerce among the several states.

(c) The said Act is violative of the Tenth Amendment to the Constitution of the United States, in that it constitutes an invasion by the Federal Government of fields of regulation reserved by that amendment to the States or to the People.

(d) The said Act is violative of the Fifth Amendment to the Constitution of the United States in that

(1) It attempts to deprive the plaintiffs without due process of law of the liberty guaranteed to them by that amendment;

(2) It attempts to deprive the plaintiffs without due process of law of their property rights, including subsisting contract rights with their employers and their inherent rights to bargain and deal with their employers in respect to rates of pay, wages, hours of employment or other conditions of employment;

(3) It is wholly arbitrary, capricious and unequal;

(4) It attempts to deprive the plaintiffs of their subsisting contracts with their employers individually and to deprive their employers of such contracts without due process of law;

(5) It attempts to take the private property of the plaintiffs, for a public use without the payment of just compensation.

(e) The said Act is violative of the Third Article of the Constitution of the United States in that judicial power of the United States in large part by said Act is attempted to be vested in said National Labor Relations Board and not in the Courts as required by said Article, and said Act attempts to infringe upon the constitutional authority of the courts of the United States.

(f) The said Act is violative of the Seventh Amendment to the Constitution in that no trial by jury is permitted or required by said Act.

(g) The said Act is violative of the Ninth Amendment to the Constitution of the United States in that by said Act the Government of the United States through the Congress has presumed and purported to assume jurisdiction and control of certain rights retained by the States or by the people.

(h) The said Act is violative of the Constitution of the United States in that the legislative power conferred upon the Congress of the United States is therein unlawfully and illegally delegated to the said National Labor Relations Board.

23. The said Act is illegal and void and unconstitutional as a whole, for each and all of the grounds named in paragraph 22 hereof.

24. All actions, orders and authorities attempted and purported to be exercised by the defendants, their agents or representatives, under and by force of said Act, are likewise void and unconstitutional for each and all of the reasons set forth in paragraphs 22 and 23 hereof.

25. In pursuing their occupations as herein set forth, the plaintiffs are not engaged in interstate commerce but in wholly intrastate activities.

26. The intrastate activities in which the plaintiffs are engaged do not directly burden, obstruct or affect interstate commerce.

27. The Bethlehem Shipbuilding Corporation, Ltd., is not engaged in interstate commerce, but is engaged solely in the operation of intrastate activities within the Commonwealth of Massachusetts.

28. The said business of the Bethlehem Shipbuilding Corporation, Ltd., carried on at its plant at said Quincy and Braintree does not directly affect interstate commerce; and the National Labor Relations Act and any actions or proceedings taken thereunder are unconstitutional, void, invalid and of no effect whatsoever as applied to the said Bethlehem Shipbuilding Corporation, Ltd. in the conduct of its said business, and as applied to its producing and maintenance employees at its plant in said Quincy and Braintree because

it is in violation of the Fifth and Tenth Amendments to the Constitution of the United States, and because it is outside the scope of any powers granted to the Congress by said Constitution.

WHEREFORE the plaintiffs pray:

1. That a temporary restraining order be granted forthwith restraining and enjoining the defendants, A. Howard Myers, individually, and as acting Regional Director for the First Region, National Labor Relations Board, and as National Labor Relations Board, Edmund J. Blake, individually, and as Regional Attorney for the First Region, National Labor Relations Board, and as the National Labor Relations Board, and Daniel M. Lyons, individually and as Trial Examiner of the National Labor Relations Board, and as the National Labor Relations Board, their and each of their assistants, employees, agents and representatives and each of them, from holding or causing to be held any hearing or hearings for the purpose of determining whether the Bethlehem Shipbuilding Corporation, Ltd., or the plaintiffs have been or are engaged at the Plant of the Bethlehem Shipbuilding Corporation, Ltd. at Quincy and Braintree, in any violation of the said National Labor Relations Act, and from undertaking any proceedings or action whatsoever with respect thereto.

2. That this Honorable Court issue its writ in due form of law directed to the defendants, A. Howard Myers, individually and as aforesaid, Edmund J. Blake, individually and as aforesaid, and Daniel M. Lyons, individually and as aforesaid, ordering them and each of them at a day certain to appear before this Honorable Court, and answer all and singular the matters and things herein set forth and complained of, and further to perform and abide by such order, direction and decree as to this Honorable Court may seem just and proper.

3. That this Honorable Court issue its order against all of said defendants and each of them, to show cause, if any they have, at a convenient date to be fixed by this Honorable Court why a preliminary injunction should not be granted restraining all and each of the aforementioned defendants during the pendency of this suit from doing any of the things herein complained of.

4. That this Honorable Court grant and issue a preliminary injunction against the defendants named herein as herein described, enjoining them and each of them, their assistants, employees, agents and representatives, and each of them, pendente lite from holding or causing to be held any hearing as hereinabove set forth.

5. That a permanent injunction be granted and issued by this Honorable Court against the defendants as described herein enjoining them and each of them, their assistants, employees, agents and representatives and each of them permanently and perpetually from holding or causing to be held a hearing such as hereinabove described.

6. That this Honorable Court shall declare and order, adjudge and decree, that the National Labor Relations Act approved July 5, 1935, and defendants' actions and proposed actions thereunder in relation to the plaintiffs in their relations with the Shipbuilding Corporation in respect of its business at its Fore River Plant, and to the relations between it and its employees there and among such employees with respect thereto, are unconstitutional, void and unenforceable.

7. That the plaintiffs may have such other and further relief in the premises as this Honorable Court shall deem just and proper.

CHARLES MacKENZIE,
Individually and as Chairman of the Representation of Employees

of the Fore River Plant of the Bethlehem Shipbuilding Corporation, Ltd.

JAMES E. MANNING,
Individually and as Vice Chairman of the Representation of Employees of the Fore River Plant of the Bethlehem Shipbuilding Corporation, Ltd.

THOMAS E. BARKER,
Individually and as Secretary of the Representation of Employees of the Fore River Plant of the Bethlehem Shipbuilding Corporation, Ltd.

By their attorneys
Brickley, Sears & Cole
B. A. Brickley
Oliver R. Waite

COMMONWEALTH OF MASSACHUSETTS.
COUNTY OF SUFFOLK.

Charles MacKenzie, James E. Manning and Thomas E. Barker, being first duly sworn, on oath depose and say that they are respectively Chairman, Vice Chairman and Secretary of the Representation of Employees of the Fore River Plant of the Bethlehem Shipbuilding Corporation, Ltd., and that they have been duly authorized by the General Body of the Representation of Employees in said Fore River Plant to bring this bill; that they have read the foregoing and above bill, and know the contents thereof, and that the facts therein set out are true except as to such facts as are therein stated on information and belief, and that as to those facts so stated to be upon information and belief, they believe them to be true.

CHARLES MacKENZIE,
JAMES E. MANNING,
THOMAS E. BARKER.

Subscribed and sworn to before me this 6th day of May, 1936.

OLIVER R. WAITE.

[SEAL]

EXHIBIT "A"

28 April 1936

At a meeting held by the General Body of Representatives of the Fore River Plant, Quincy, Mass., on Tuesday, April 28th, 1936, at 10:00 A. M., with Charles MacKenzie presiding, a motion was made:

> That the officers of the General Body, namely: the Chairman, Vice Chairman, and Secretary, be authorized to take such steps as they deem advisable to protect the continuation of the Employees' Representation Plan, including the right to litigate if necessary. Motion was carried.

Thomas Barker, (Signed)
Secretary
General Body of Employee Reps.

The above is a true
copy of Motion.

Commonwealth of Massachusetts.

Norfolk, ss. April 30, 1936.

Sworn and subscribed to before me by Thomas Barker.

Francis J. Leahy, (Signed)
Notary Public.
My commission expires June 4, 1938

On the 11th day of May, A. D. 1936, the following special appearance is filed:

SPECIAL APPEARANCE OF EDMUND J. BLAKE.

[Filed May 11, 1936.]

The clerk will enter my special appearance for the defendants.

EDMUND J. BLAKE,
460 Federal Bldg.,
Boston, Mass.

On the said 11th day of May, A. D. 1936, it is ordered by the court that the plaintiffs' motion to amend the bill of complaint be allowed, counsel for defendant being present and not objecting.

On the 12th and 13th days of May, A. D. 1936, the following affidavits were filed:

AFFIDAVIT OF CHARLES MacKENZIE.

[Filed May 12, 1936.]

Charles MacKenzie, of Quincy, County of Norfolk, and Commonwealth of Massachusetts, being duly sworn, on oath deposes and says:

1. He is an employee of the Bethlehem Shipbuilding Corporation, Ltd., at its Fore River Plant, located in Quincy and Braintree, Massachusetts. He has been an employee in said Plant for approximately thirty-six years, and he is now and has during his entire term of employment, been a general foundryman, working in the Foundry Department in said Plant.

He is a representative elected by the employees under the Representation of Employees Plan in the Fore River Plant, having been last elected in March, 1936. He is Chairman of the General Body of the Representation of Employees Plan for the year 1936. He has been a Representative of the Employees and member of the General Body since March, 1933.

2. During the time in which the Representation of Employees Plan has been in operation in the Fore River Plant, and during which he has been an employee in said Plant, no official or employee of the Bethlehem Shipbuilding Corporation, Ltd. who had the power to recommend the hiring or discharging of the employees, or who regularly held a supervisory position in said plant, has in any manner dominated

or attempted to dominate, or interfered with, or attempted to interfere with him, either as an employee or as a representative of the Employees elected under the Plan. He does not know, nor has he ever heard of any employee who has in any manner been dominated or interfered with by any official or representative of the management under the operation of the Plan. That if any such domination or interference had existed or had been attempted, he would have learned of it either through his contact with the employees, or in his duties as a representative of the employees. That if any such domination or interference had been brought to his attention, he would have notified the management of the Corporation, and he believes that the management would have taken immediate steps to terminate any such interference or domination.

3. Prior to 1923 when the Representation of Employees Plan was placed in operation, there had been numerous and frequent walk-outs and other labor disagreements which had caused interruptions in the employment in said Plant, with resultant loss in wages and interference with steady employment. The Representation of Employees Plan since 1923 has provided an effective method for settling questions which have arisen between the management and the employees, and has entirely eliminated the interruptions in employment caused by such questions. The result has been steady employment for the employees and the Plant and through the effective means of bargaining with the management provided by the Plan, there has been a steady improvement in the hours, rates of pay and working conditions in the Plant for the employees.

4. During the period since 1923 when the Employees Representation Plan was placed in effect, many questions have arisen and been settled through the operation of the Plan. This has resulted in harmonious relations between

the employees and the management, and has given the employees and the management confidence in the effectiveness of the Plan. During the period since 1923 the results of the operation of the Plan have become apparent to both the employees and the management. The percentage of employees who participate in the elections under the Plan is proof of the confidence and almost universal support which the Plan possesses among the employees. At the last election held in March, 1936, over ninety-six per cent. of the employees cast ballots. This confidence and acceptance of the Plan by such a large majority of the employees is of tremendous value to the employees assuring as it does a unity among the employees in their relations with the management. The Plan itself deprived of this confidence and endorsement of such a large number of employees would cease to be an effective means for bargaining with the management or for the amicable settlement of questions which arise.

5. The charge contained in the complaint issued by the National Labor Relations Board that the Bethelehem Shipbuilding Corporation, Ltd. has been and is now engaged in certain unfair labor practices, and is violating a law of the United States with reference to the Representation of Employees Plan will have the effect of raising a doubt in the minds of some of the employees as to whether the Corporation will be permitted to negotiate with the employees through the Plan. The charges made by the National Labor Relations Board that the Corporation is dominating the Plan has seriously affected the confidence of some of the employees in the Plan. The holding of a public hearing by the National Labor Relations Board on the charges alleged in the complaint will destroy the confidence of many of the employees in the Plan, and will remove the support of many of the employees from the Plan.

6. The destruction of the confidence of the employees

in the Plan and the resulting loss of its effectiveness as a means of bargaining with the management and as a means for settling questions which may arise between the employees and the management will deprive the employees of the results of many years of successful operation of the Plan during which it has been tried and found to be effective. This loss will be an irreparable damage to the employees and will place them in a position where they will again have to build up in any new plan the confidence which is necessary for the successful operation of any representation of employees.

CHARLES MacKENZIE.

Sworn to before me this 12th day of May, 1936.

OLIVER R. WAITE,
Notary Public.

[SEAL]

AFFIDAVIT OF WILLIAM HARVEY.

[FILED MAY 12, 1936.]

William Harvey, being first duly sworn, on oath deposes and says:

1. He is a citizen of the United States, and a resident of Quincy, Massachusetts, and is now and since June, 1907, has been employed at the Fore River Plant of Bethlehem Shipbuilding Corporation, Ltd., in Quincy and Braintree, Massachusetts, as a machinist. At the present time he lays out work for six other machinists, and has been doing that for the last two years.

He is not now and never has been an Employees Representative under the Plan of Employees' Representation in effect at the Fore River Plant.

2. Before the Plan of Employees' Representation was adopted, there was no way of settling the grievances of the

employees. The employees were afraid that if they complained, their superiors would hold it against them and lay them off. Up to that time there was no organized effort to make conditions good and the machine shop safe. There were two unions in the machine shop, each of which was antagonistic towards the other, and neither one would do anything for the men. There was no protection of service by way of pensions, and a man could work at the Fore River Plant until he was unable to work any more and then be laid off without anything further for support.

Since the Plan has been in effect, the employees have had a real method of getting their grievances settled quickly, working conditions have been improved, and the machine shop safety record is high. The men feel that with a pension ahead they have security for their old age, and that when the time comes for a layoff, the service record of the employee will insure his being given preference in accordance with it.

Since the adoption of the Plan, there has been no interruption in employment in the machine shop because of labor trouble. There exists at the present time between the Shipbuilding Corporation and its employees in the machine shop and at the Fore River Plant generally, the most pleasant, friendly and harmonious relations, and, to the best of his knowledge, information and belief, there is not any question regarding rates of pay, wages, hours of employment or other conditions of employment at said Plant or with respect to any other matter of interest to the employees there that is unsettled. He believes that the employees at said Plant feel that all such questions that have arisen have been settled satisfactorily, although some of them were not settled in favor of the employees concerned.

Moreover, all of such employees at the Fore River Plant know that, if at any time any such question shall arise which they, or any of them, shall desire to take up with the management at said Plant, they can do so through their Employees'

Representatives under said Plan of Employees' Representation or in any other manner that they shall desire without fear of any domination, interference, intimidation or coercion on the part of the Shipbuilding Corporation. Furthermore, to the best of his knowledge, information and belief, the substantial and preponderant majority of such employees desire that there shall not be any change in the relations at said Plant between them and the Shipbuilding Corporation and in the available methods and means of collective bargaining between such employees and the Shipbuilding Corporation with respect to rates of pay, wages, hours of employment, or other conditions of employment.

He believes that the Plan has proven its value to the employees by its successful operation, and that the hearing proposed by the National Labor Relations Board will impair the effectiveness of the Plan, to the injury of the employees.

WILLIAM HARVEY.

Sworn to before me this 12th day of May, 1936.

OLIVER R. WAITE,
Notary Public.
[SEAL]

AFFIDAVIT OF WILLIAM G. McDERMOTT.

[FILED MAY 12, 1936.]

William G. McDermott, of Quincy, County of Norfolk, and Commonwealth of Massachusetts, being duly sworn, on oath deposes and says:

1. He is an employee of the Bethlehem Shipbuilding Corporation, Ltd., employed at its Fore River Plant, located in Quincy and Braintree, Massachusetts. He has been continuously employed at said Plant for a period of twenty-one years, during which period he has worked in various depart-

ments of the Plant, and is at the present time a shipwright. Under the Representation of Employees Plan in the Fore River Plant, he is at present a member of the General Body, having been duly elected at the last election held in March, 1936, by the employees in the Shipwrights Department of said Plant. He is familiar with the operation of the Representation of Employees Plan, and through daily contact with the employees in the Plant knows the attitude of the employees toward the present Plan and the results of its operation.

2. Prior to 1923 when the Representation of Employees Plan was placed in operation, there had been numerous and frequent walk-outs and other labor disagreements which had caused interruptions in the employment in said Plant, with resultant loss in wages and interference with steady employment. The Representation of Employees Plan since 1923 has provided an effective method for settling questions which have arisen between the management and the employees, and has entirely eliminated the interruptions in employment caused by such questions. The result has been steady employment for the employees and the Plant and through the effective means of bargaining with the management provided by the Plan there has been a steady improvement in the hours, rates of pay and working conditions in the Plant for the employees.

3. During the period since 1923 when the Employees' Representation Plan was placed in effect, many questions have arisen and been settled through the operation of the Plan. This has resulted in harmonious relations between the employees and the management, and has given the employees and the management confidence in the effectiveness of the Plan. During the period since 1923 the results of the operation of the Plan have become apparent to both the employees and the management. The percentage of employees who participated in the elections under the Plan is proof of the con-

fidence and almost universal support which the Plan possesses among the employees. At the last election held in March, 1936, over ninety-six percent of the employees cast ballots. This confidence and acceptance of the Plan by such a large majority of the employees is of tremendous value to the employees assuring as it does a unity among the employees in their relations with the management. The plan itself deprived of this confidence and endorsement of such a large number of employees would cease to be an effective means for bargaining with the management or for the amicable settlement of questions which arise.

4. The charge contained in the complaint issued by the National Labor Relations Board that the Bethlehem Shipbuilding Corporation, Ltd., has been and is now engaged in certain unfair labor practices, and is violating a law of the United States with reference to the Representation of Employees Plan has had the effect of raising a doubt in the minds of some of the employees as to whether the Corporation will be permitted to negotiate with the employees through the Plan. The charges made by the National Labor Relations Board that the Corporation is dominating the Plan has seriously affected the confidence of some of the employees in the Plan. The holding of a public hearing by the National Labor Relations Board on the charges alleged in the complaint will destroy the confidence of many of the employees in the Plan and will remove the support of many of the employees from the Plan.

5. He has been an elected representative of the employees every year since the adoption of the Plan in 1923. He was Chairman of the General Body under the Plan from March, 1927, to March, 1936. During the entire period since the adoption of the Plan to the present time, no official or employee of the Shipbuilding Corporation who had the power to recommend the hiring or discharging of the employees, or

who regularly held a supervisory position, has in any manner whatsoever dominated or attempted to dominate, or interfered with, or attempted to interfere with him in the exercise of his duties as an Employees' Representation under said Plan, and he has never heard that any such official or employee has in any manner whatsoever dominated, or attempted to dominate, or interfered with, or attempted to interfere with, any Employees' Representation, or any employee under said Plan. If there had been any instance of such domination, or attempted domination, or interference, or attempted interference, it would have come or been brought to his attention in his capacity as Employees' Representative and during many years also as Chairman of such General Body under said Plan. Furthermore, if any instance of any such domination, or attempted domination, or interference, or attempted interference, had been brought or come to his attention, he would have taken immediate steps to bring such instance to the attention of the management at the Fore River Plant, and he is confident that such management would have taken immediate steps to put an end to it, and to have eliminated the cause of any such domination.

6. From his daily contact with the employees in the Plant, he is convinced that the great majority of them are satisfied with the Plan, and do not feel that they are dominated or interfered with in their participation of the Plan, or in the operation of the Plan by the Bethlehem Shipbuilding Corporation, Ltd.

WILLIAM G. McDERMOTT.

Sworn to before me this 12th day of May, 1936.

OLIVER R. WAITE,
Notary Public.

[SEAL]

AFFIDAVIT OF MARK HANABURY

[Filed May 12, 1936.]

Mark Hanabury, being first duly sworn, on oath deposes and says:

1. That he is a citizen of the United States, and is resident in Weymouth, Massachusetts, and has since July 11, 1919, been employed as a pattern maker at the Fore River Plant of the Bethlehem Shipbuilding Corporation, Ltd., located in Quincy and Braintree, Massachusetts. His work as pattern maker consists of making wooden patterns from which moulds for metal castings are made.

2. At the time when he first went to work at the Fore River Plant, the Pattern Shop was a union shop, and no one could work there without a union card. At that time there was no way in which the employees in the Pattern Shop could settle any questions or grievances which might arise relative to their hours of work, rates of pay, or other working conditions, and the only manner in which such questions could be raised was through the headquarters of the union in Boston.

Some time in March, 1921, a disagreement arose between the employees and the management of the corporation relative to a reduction in pay. The employees with the support of the union, were compelled to go on strike in order to raise their objection to this reduction in pay. The result of this strike was that the employees in the Pattern Shop were out of work for a period approximating three months.

In 1923 the Employees' Representation Plan was placed in effect, and has been in operation continuously to the present time. During this period, there has been no strike or walk-out or other termination of employment in the Pattern Shop arising out of disagreements between the employees and the management. All questions concerning rates of pay,

hours of work and other working conditions have been referred to the representatives of the employees, and through the operation of the Representation of Employees Plan have been settled without any interruption in the work or wages of the employees. The situation which arose in 1921 and resulted in a strike, under the operation of the Plan would have been settled without any loss of time or loss of wages for the employees.

3. In 1921, there was no pension plan in operation at the Fore River Plant, and when work was slack, the employees were laid off without reference to their service records. Now there is a pension system, which is operated through said Plan of Employees Representation, and the service of the employees is protected, and when work slackens up and employees have to be laid off, it is done without discrimination, and in accordance with service records.

Since the Plan was adopted, the grievances of the employees have been settled in a very short time. There exists at the present time between the Shipbuilding Corporation and its employees at the Fore River Plant the most pleasant and harmonious relations. He does not know of any question of any importance at said Plant regarding rates of pay, wages, hours of employment or other conditions of employment at said Plant; or with respect to any other matter of interest to the employees there which is unsettled at the present time. Many such questions have arisen in the past, but since the Plan of Employees' Representation went into effect, they have been settled promptly and in a manner satisfactory to the employees.

He believes that all the employees at the Fore River Plant know that if at any time any question of interest to them in connection with their employment shall arise which they, or any of them, shall desire to take up with the management at said Plant, they can do so through their Em-

ployees' Representatives under the Plan of Employees' Representation, or in any other manner that they shall desire, without fear of any domination, interference, intimidation or coercion on the part of the Shipbuilding Corporation. Furthermore, he believes the very great majority of all the employees at the Fore River Plant desire that there shall not be any change in the status of the relations at said Plant between them and their employer, and in the available methods and means of collective bargaining between such employees and their employer with respect to rates of pay, wages, hours of employment, or other conditions of employment.

The results of the operation of the Plan of Employees' Representation have convinced the majority of the employees that it successfully represents them in their dealings with the management, and the employees have confidence that through the machinery of the Plan, they can reach a fair and favorable agreement with the management without any interruption in their employment or in their wages.

MARK HANABURY.

Subscribed and sworn to before me this 12th day of May, 1936.

OLIVER R. WAITE,
Notary Public.
[SEAL]

AFFIDAVIT OF THOMAS E. BARKER.

[FILED MAY 13, 1936.]

Thomas E. Barker, being first duly sworn, on oath deposes and says:

1. He is a resident of North Weymouth, Commonwealth of Massachusetts, and is a citizen of the United States. He is now and for approximately six years has been employed by the Bethlehem Shipbuilding Corporation, Ltd., at its Fore

River Plant in Quincy and Braintree, Massachusetts. He is at present employed as a machinist in the Outside Machinists Department in said Plant.

2. He is a representative of the employees in the Fore River Plant having been elected at the last annual election held in March, 1936. He was a representative of the employees under the Representation of Employees Plan previous to his present term as such representative having served for one year in 1934. Since March, 1936, he has been the Secretary of the General Body of the Representation of Employees having been elected to that office by the General Body.

3. As Secretary of the General Body it is his duty to keep records of all meetings of the Body and has custody of all the records kept of the operation of the Representation of Employees. The records of the election held by the employees under the Plan in March, 1936, show that 96.2% of the employees eligible to vote under the Plan cast ballots at that election.

4. On or about April 24, 1936, he received a subpoena from the National Labor Relations Board requiring him to appear at the hearing in the proceedings in this matter originally scheduled for April 27, 1936, and to bring with him and produce the "Records of the Employees Representation Plan, Fore River Plant, Bethlehem Shipbuilding Corporation, Records of minutes of meetings, record of receipts and disbursements, communications between the company and the Employees Plan". A copy of the subpoena is hereto annexed.

5. It is his opinion based upon his contact with the employees and from his position as Secretary of the General Body that by far the great majority of the employees believe the Representation of Employees Plan effectively represents them in their negotiations with the management and that the employees are opposed to any interference by the Labor Board

with the operation of the Plan or with the form and organization of the Plan as it now exists. This is evidenced by the vote of the General Body authorizing the Chairman, Vice Chairman and Secretary of that Body to take such steps as they deemed advisable to protect the continuation of the Employees Representation Plan, a copy of which is contained in the Bill of Complaint.

THOMAS E. BARKER.

Subscribed and sworn to before me this 13th day of May, 1936.

OLIVER R. WAITE.
Notary Public.
[SEAL.]

"SUBPOENA DUCES TECUM

UNITED STATES OF AMERICA
National Labor Relations Board

"To Thomas Barber, Secretary Employees Representation Plan Fore River Plant, Bethlehem Shipbuilding Corporation.
39 Princeton Avenue, North Weymouth, Mass.

"You are hereby required to appear before a Trial Examiner of the National Labor Relations Board, at Room 1309 Federal Building in the City of Boston, Massachusetts on the 27th day of April, 1936, at ten o'clock, a. m. of that day to testify in the Matter of Bethlehem Shipbuilding Corporation and Industrial Union of Marine and Shipbuilding Workers of America.

"And you are hereby required to bring with you and produce at said time and place the following books, records, correspondence, and documents:

Records of the Employees Representation Plan, Fore River Plant, Bethlehem Shipbuilding Corporation. Records of minutes of meetings, record of receipts and disbursements, communications between the company and the Employees Plan.

"Fail not at your peril.

[SEAL]

"In testimony whereof, the seal of the National Labor Relations Board is affixed hereto, and the undersigned, a member of said National Labor Relations Board, has hereunto set his hand at Washington, D. C. this 23rd day of April, 1936.

Jno. M. Carmody"

On the 14th day of May, A. D. 1936, the following order continuing restraining order in force is entered:

ORDER ON PLAINTIFFS' PETITION TO CONTINUE RESTRAINING ORDER IN FORCE TO MAY 19, 1936.

May 14, 1936.

BREWSTER, J.

The above cause came on for hearing on the Petition of the plaintiffs to continue the restraining order in force and it appearing that the hearing on the order to show cause has previously been continued to May 19, 1936, it is

ORDERED that the restraining order previously entered in this case be continued in full force and effect to and including May 19, 1936.

By the Court:
JAMES S. ALLEN,
Clerk.

May 14, 1936
E. H. B.
D. J.

On the 19th day of May, A. D. 1936, the following order continuing restraining order in force is entered:

ORDER ON PLAINTIFFS' PETITION TO CONTINUE RESTRAINING ORDER IN FORCE TO MAY 29, 1936.

May 19, 1936.

BREWSTER, J.

The above case came on for hearing on the Petition of the plaintiffs to continue the restraining order in force and it appearing that the hearing on the order to show cause has previously been continued to May 29, 1936, it is

ORDERED that the restraining order previously entered in this case be continued in full force and effect to and including May 29, 1936.

By the Court:
JOHN E. GILMAN, JR.,
Deputy Clerk.

May 19, 1936
E. H. B.
D. J.

Also on the said 19th day of May, A. D. 1936, the following supplemental affidavits are filed:

SUPPPLEMENTAL AFFIDAVIT OF CHARLES MACKENZIE.

[FILED MAY 19, 1936.]

CHARLES MACKENZIE, being first duly sworn, on oath deposes and says:

1. He is a representative elected by the employees under the Plan of Employees' Representation of the employees of Bethlehem Shipbuilding Corporation, Ltd., at its Fore River Plant, having been duly elected as such at the last annual election held in March, 1936. He is Chairman of the

General Body of Employees' Representatives under said Plan, having been duly elected as such at the organization meeting of such General Body held in March, 1936. He has been a representative of the employees and member of the General Body since March, 1933, and was Vice-Chairman of said General Body for three terms beginning March, 1933.

2. On April 24, 1936, he received through the mail in an envelope postmarked Boston, Massachusetts, April 23, 1936, a subpoena of the National Labor Relations Board for his attendance at the hearing to be held on April 27, 1936, which subpoena purports to be signed by Edwin S. Smith. A copy of the subpoena is annexed hereto, marked "Exhibit A".

CHARLES MacKENZIE.

Subscribed and sworn to before me this 18th day of May, 1936.

OLIVER R. WAITE,
Notary Public.
[SEAL.]

"EXHIBIT A."

SUBPOENA,
UNITED STATES OF AMERICA.
National Labor Relations Board.

To Charles MacKenzie, Chairman, Employees Representation Plan Fore River Plant, Bethlehem Shipbuilding Corpn. Ltd.,
41 Moor Street, Quincy, Massachusetts.

You are hereby required to appear before a Trial Examiner of the National Labor Relations Board, at Room 1309 Federal Building in the City of Boston, Massachusetts, on the 27th day of April, 1936, at ten o'clock

a. m. of that day, to testify in the matter of Bethlehem Shipbuilding Corpn. Ltd. and Industrial Union of Marine and Shipbuilding Workers of America.

Fail not at your peril.

In testimony whereof, the seal of the National Labor Relations Board is affixed hereto, and the undersigned, a member of said National Labor Relations Board, has hereunto set his hand at Washington, D. C. this 23rd day of April, 1936.

[SEAL]

S— Edwin S. Smith.

SUPPLEMENTAL AFFIDAVIT OF WILLIAM G. McDERMOTT.

[Filed May 19, 1936.]

William G. McDermott, of Quincy, County of Norfolk, Commonwealth of Massachusetts, being first duly sworn, on oath deposes and says:

1. He has heretofore made an affidavit which he is informed and believes has now been filed as a part of the record in the above entitled matter.

2. Supplementing the allegations set forth in said affidavit he says that during the years 1927-1936 he was Chairman of the General Body under the Plan of Representation of Employees in the Fore River Plant of the Bethlehem Shipbuilding Corporation, Ltd.

While he was acting as said Chairman a complaint was filed with the National Labor Relations Board under the National Industrial Recovery Act by the Local Number 5 of the Industrial Union of Marine and Shipbuilding Workers of America and he, together with other members of the afore-

said General Body acted in its behalf and on behalf of said Plan at the hearings under said complaint.

4. Prior to the beginning of said hearings considerable trouble occurred at the Fore River Plant of said Bethlehem Shipbuilding Corporation, Ltd., due to the fact that employees with long service records became fearful that they might lose benefits which they felt were guaranteed them under said Plan.

5. As Chairman of such General Body he became much worried and agitated over this situation because of his feeling that an attempt was being made to force upon the employees at the said Fore River Plant a means of collective bargaining which said employees did not desire and which would result in the destruction of the Plan of Employees' Representation which was satisfactory to said employees.

6. As a result of the foregoing he deemed it his duty as Chairman to do everything he could to assist other Employees' Representatives who had been elected under said Plan by said employees at said plant to represent them to oppose the aforesaid endeavors and to protect the Plan then in force and which an overwhelming majority of the employees at said Fore River Plant desired to have continue as it had for many years as a method and means of collective bargaining with the Shipbuilding Corporation with respect to rates of pay, wages, hours of employment, conditions of employment and other questions of interest to such employees.

7. That this represented the wishes and desires of said employees was evident by the very great interest which they showed in said hearings. Many of them attended the hearings upon their own time and after each hearing groups of employees would discuss with Employees' Representatives who had represented said General Body and said Plan at the hearings to inquire what had transpired at the hearings, what

might happen and what consequences might result. Many of said employees offered to testify at the hearings as to the benefits received by them under the Plan and announced to said Employees' Representatives a willingness and desire to do anything and everything which they could do to keep said Plan from being in any way injured or destroyed.

8. On April 24, 1936, he received through the mail in an envelope postmarked Boston, Mass., April 23, 1936, a subpoena of the National Labor Relations Board for his attendance at the hearing scheduled to be held on April 27, 1936, which subpoena purports to be signed by Edwin S. Smith. A copy of the subpoena is annexed hereto marked "Exhibit A".

WILLIAM G. McDERMOTT.

Subscribed and sworn to before me this 18th day of May, 1936.

OLIVER R. WAITE,
Notary Public.
[SEAL]

"Exhibit A"

SUBPOENA
UNITED STATES OF AMERICA
National Labor Relations Board

To William G. McDermott
609 Willard St., Quincy, Massachusetts.

You are hereby required to appear before a Trial Examiner of the National Labor Relations Board, at Room 1309 Federal Building, in the City of Boston, Massachusetts, on the 27th day of April, 1936, at ten o'clock a. m. of that day, to testify in the Matter of Bethlehem

Shipbuilding Corpn. Ltd. and Industrial Union of Marine and Shipbuilding Workers of America.

Fail not at your peril.

In testimony whereof, the seal of the National Labor Relations Board is affixed hereto, and the undersigned, a member of said National Labor Relations Board, has hereunto set his hand at Washington, D. C., this 23d day of April, 1936.

Edwin S. Smith (Signed)

(Seal of National Labor Relations Board)

Notice to Witness—If claim is made for witness fee or mileage, this subpoena should accompany voucher.

SUPPLEMENTAL AFFIDAVIT OF THOMAS E. BARKER.

[Filed May 19, 1936.]

Thomas E. Barker, of North Weymouth, County of Norfolk and Commonwealth of Massachusetts, being first duly sworn, on oath deposes and says:

1. He is an employee of the Bethlehem Shipbuilding Corporation, Ltd., at its Fore River Plant located in Quincy and Braintree, Massachusetts. He has been an employee in said Plant for approximately six years and is now a machinist working in the Outside Machinists Department in said Plant.

2. He is an Employees' Representative elected by the employees under the Plan of Employees' Representation of said employees at the Fore River Plant, having been last elected as such in March, 1936. He is and since March, 1936, has been Secretary of the General Body of Representatives

of the Employees of the Bethlehem Shipbuilding Corporation, Ltd., at the Fore River Plant. He was elected to that office by the General Body under the Plan of Employees' Representation of said employees. As such Secretary it is his duty to keep records of all meetings of the Body and he has custody of all records kept of the operations of the Plan, including all records pertaining to the holding of and the results of the Nominations and Elections held under said Plan.

3. The records of the operations of said Plan of Employees' Representation show that of the employees of the Bethlehem Shipbuilding Corporation, Ltd., at the Fore River Plant who were eligible under said Plan to vote at the Nominations that were held on March 11, 1935, and who were at said Plant on that day 92.3% cast ballots which were counted thereat, and such records show that of the employees of said Shipbuilding Corporation at the Fore River Plant who were eligible under said Plan to vote at the election that was held on March 15, 1935, and who were at said Plant on that day 97% cast ballots which were counted thereat. Such records show that the corresponding percentages of the Nominations and Elections that were held in March, 1936, were 93.8% and 97.2% respectively.

4. On April 24, 1936, he received through the mail in an envelope postmarked Boston, Mass., April 23, 1936, a subpoena which purports to be signed by John M. Carmody. Said subpoena required that he attend the hearing before the Labor Board April 27, 1936, and bring with him certain papers in such subpoena described. A copy of the subpoena is annexed hereto marked "Exhibit A".

THOMAS E. BARKER.

Subscribed and sworn to before me this 18th day of May, 1936.

OLIVER R. WAITE.
Notary Public.
[SEAL]

"EXHIBIT A"

SUBPENA DUCES TECUM.
UNITED STATES OF AMERICA.
National Labor Relations Board.

To Thomas Barker, Secretary Employees' Representation Plan, Fore River Plant, Bethlehem Shipbuilding Corpn.
39 Princeton Avenue, North Weymouth, Mass.

You are hereby required to appear before a Trial Examiner of the National Labor Relations Board at Room 1309 Federal Building in the City of Boston, Massachusetts, on the 27th day of April, 1936, at ten o'clock a. m. of that day, to testify in the Matter of Bethlehem Shipbuilding Corporation and Industrial Union of Marine and Shipbuilding Workers of America.

And you are hereby required to bring with you and produce at said time and place the following books, records, correspondence, and documents:

Records of the Employees Representation Plan. Fore River Plant, Bethlehem Shipbuilding Corpn. Records of minutes of meetings, records of receipts and disbursements, communications between the company and the Employees' Plan.

Fail not at your peril.

In testimony whereof, the seal of the National Labor Relations Board is affixed hereto, and the undersigned, a member of said National Labor Relations Board, has hereunto set his hand at Washington, D. C. this 23rd day of April, 1936.

[SEAL]

S — John W. Carmody.

AFFIDAVITS OF H. E. D. GOULD, A. B. HOMER, EARL L. PRATT, W. H. COLLINS AND S. W. WAKEMAN.

[MEMORANDUM. By agreement of parties, affidavits of H. E. D. Gould, A. B. Homer, Earl L. Pratt, W. H. Collins and S. W. Wakeman, filed in case No. 4321, Equity are made part of this transcript of record and will be found printed on pages 86-108 of this volume. JAMES S. ALLEN, CLERK.]

On the 22nd day of May, A. D. 1936, the following special appearance and motion to quash subpoena are filed:

SPECIAL APPEARANCE OF MALCOLM F. HALLIDAY.

[FILED MAY 22, 1936.]

No. 4324, Eq. Charles MacKenzie et al. v. A. Howard Myers et al.

To the Clerk of the United States District Court for the District of Massachusetts:

You will please enter my special appearance as Attorney for A. Howard Myers, "National Labor Relations Board, and as the National Labor Relations Board", Edmund J. Blake, "National Labor Relations Board, and as the National Labor Relations Board", and Daniel M. Lyons, "as the National Labor Relations Board", so designated in the above entitled cause.

Said special appearance is made for the sole purpose of objecting to the jurisdiction of this Court over said denominated defendants in the said above-named proceeding.

MALCOLM F. HALLIDAY,

Attorney appearing specially for A. Howard Myers, "National Labor Relations Board, and as the National Labor Relations Board", Edmund J. Blake, "National Labor Relations Board, and as the National Labor Relations Board", and Daniel M. Lyons, "as the National Labor Relations Board".

MOTION TO QUASH SUBPOENA.

[Filed May 22, 1936.]

Now come A. Howard Myers, "National Labor Relations Board, and as the National Labor Relations Board", Edmund J. Blake, "National Labor Relations Board, and as the National Labor Relations Board", and Daniel M. Lyons, "as the National Labor Relations Board", denominated defendants herein, and named in the subpoena and amended bill of complaint as such defendants, and appearing specially by Malcolm F. Halliday, their attorney, and limiting their appearance herein specially and solely for the purpose of this motion, and for no other purpose whatsoever, move the Court to quash the subpoena heretofore issued by the Court herein, and as reasons therefor assign the following:

1. A. Howard Myers, as affirmatively appears in the amended bill of compaint, heretofore filed, is not a member of the National Labor Relations Board and is not the National Labor Relations Board.

2. Edmund J. Blake, as affirmatively appears in the amended bill of complaint, heretofore filed, is not a member of the National Labor Relations Board and is not the National Labor Relations Board.

3. Daniel M. Lyons, as affirmatively appears in the amended bill of complaint, heretofore filed, is not a member of the National Labor Relations Board and is not the National Labor Relations Board.

4. The said "National Labor Relations Board", as affirmatively appears in the amended bill of complaint filed by the plaintiffs herein, is, and at all times therein mentioned was, a duly authorized and existing Board of the United States of America, and an agency thereof under the provi-

sions of the National Labor Relations Act, and as such may not be sued at law or in equity as a party defendant or at all without an act of Congress authorizing such suit or proceedings; that no such act of Congress is pleaded in the plaintiffs' amended bill of complaint, nor has such act of Congress been passed.

5. The "National Labor Relations Board", as affirmatively appears in the amended bill of complaint, filed by the plaintiffs herein, was not at the time of the filing of the amended bill of complaint or at any time thereafter an inhabitant of the District of Massachusetts.

MALCOLM F. HALLIDAY,
Attorney appearing specially for A. Howard Myers, "National Labor Relations Board, and as the National Labor Relations Board", Edmund J. Blake, "National Labor Relations Board, and as the National Labor Relations Board", and Daniel M. Lyons, "as the National Labor Relations Board".

Also on the said 22nd day of May, A. D. 1936, the following defendants' motion to dismiss amended bill of complaint is filed:

DEFENDANTS' MOTION TO DISMISS AMENDED BILL OF COMPLAINT.

[FILED MAY 22, 1936.]

Now come the defendants, A. Howard Myers, individually and as Acting Regional Director for the First Region, Edmund J. Blake, individually and as Regional Attorney for the First Region, and Daniel M. Lyons, individually and as Trial Examiner of the National Labor Relations Board des-

ignated or to be designated by the National Labor Relations Board, and move the Court to dismiss the amended bill of complaint herein and as reasons therefor assign the following:

1. The amended bill of complaint on its face fails to state a cause of action entitling the plaintiffs to the relief prayed for or any relief in equity against the said defendants.

2. The amended bill of complaint on its face shows that the plaintiff is not threatened with or in danger of suffering any great, irreparable or immediate injury cognizable in equity by reason of any matter set forth in the said amended bill of complaint.

3. It appears on the face of the amended bill of complaint that this case does not really and substantially involve a dispute or controversy properly within the jurisdiction of this Court in that the amount or value of the subject matter in dispute as appears in the amended bill of complaint does not exceed $3,000 exclusive of interests and costs.

4. It appears upon the face of the amended bill of complaint that no real substantial or colorable dispute or controversy involving the Constitution and laws of the United States is involved.

5. It appears upon the face of the amended bill of complaint that the plaintiffs by following the procedure set forth in the National Labor Relations Act would not be deprived of property without due process of law and would not be denied the equal protection of the law.

6. The said amended bill of complaint on its face fails to state a case or controversy of a justifiable question for the determination of this Honorable Court within the meaning of Article III, Sections 1 and 2 of the Constitution of the United States.

7. The said amended bill of complaint on its face fails to show an "actual controversy" within the meaning of the Federal Declaratory Judgment Act, Section 274-D of the Judicial Code (Section 400, Title 28, U. S. Code).

8. It appears on the face of the amended bill of complaint that granting the relief prayed would constitute an invasion of the powers of the legislative and executive branches of the Federal Government and is further a usurpation of the authority exclusively vested in the Circuit Court of Appeals by the National Labor Relations Act.

9. It appears upon the face of the amended bill of complaint that the plaintiffs have a plain, adequate and complete remedy at law under the provisions of the National Labor Relations Act with respect to any rights growing out of the matters alleged in the amended bill of complaint.

10. It appears on the face of the amended bill of complaint that plaintiffs have failed to resort to any of their administrative remedies and have failed to exhaust their said remedies which afford a plain, adequate and complete remedy with respect to any rights of the plaintiffs involved in this case.

11. It appears on the face of the amended bill of complaint that the only power of the defendant A. Howard Myers is to cause a hearing to be conducted. It further appears on the face of the Amended bill of complaint that the proceeding before the National Labor Relations Board under the National Labor Relations Act involved herein is not a proceeding against plaintiffs, and that plaintiffs can not and will not be directed to do anything or to cease and desist from doing anything during the course of such proceeding before the National Labor Relations Board.

12. It appears upon the face of the amended bill of complaint that the Bethlehem Shipbuilding Corporation, Ltd., will not be legally obligated in any manner unless and

until (a) a hearing has been conducted by Daniel M. Lyons or other trial examiner designated by the National Labor Relations Board; (b) the Trial Examiner files an intermediate report with the National Labor Relations Board containing findings and recommendations in which findings and recommendations the Trial Examiner determines (1) the Board has jurisdiction in the premises and (2) the Bethlehem Shipbuilding Corporation, Ltd., has committed unfair labor practices affecting commerce within the meaning of Section 8 of said Act; (c) the matter has been reviewed by the National Labor Relations Board; (d) a final decision is subsequently made by the National Labor Relations Board, adverse to the Bethlehem Shipbuilding Corporation, Ltd., and after a determination that the Board has jurisdiction in the premises and after a determination that the Bethlehem Shipbuilding Corporation, Ltd., has committed unfair labor practices affecting commerce; (e) upon the said decision an order is issued by the National Labor Relations Board requiring the Bethlehem Shipbuilding Corporation to cease and desist and end its unfair labor practices as found; (f) The Bethlehem Shipbuilding Corporation, Ltd., refuses to comply with the Board's order; (g) an application by the National Labor Relations Board to the appropriate Circuit Court of Appeals of the United States is made under the provisions of Section 10 of the National Labor Relations Act to enforce the said order; (h) the said Court of Appeals reviews the case, sustains the order of the Board or some part of it and issues its own order; (i) the order of the Circuit Court of Appeals is violated by the Bethlehem Shipbuilding Corporation, Ltd.; (j) said Bethlehem Shipbuilding Corporation, Ltd., is cited for contempt of court; and (k) said Bethlehem Shipbuilding Corporation, Ltd., is found by the Court of Appeals to be guilty of contempt of court.

13. It appears on the face of the amended bill of complaint that it is beyond the power of the defendants under

the National Labor Relations Act to attempt to prosecute or to prosecute in any respect involving any fine, forfeiture or penalty and there is accordingly no occasion whatever to enjoin the defendants from doing any matter or thing in that respect, all such prosecutions which might be made under the National Labor Relations Act being a matter for determination by the Attorney General of the United States or the Department of Justice or his or its officers or agents, no one of whom is made a party defendant in this cause.

14. Said plaintiffs fail to allege that said moving defendants have claimed, exercised or threatened to exercise any power to prosecute said plaintiffs criminally under Section 12 of the said Act or that the said moving defendants have recommended or requested or threatened to recommend or request that the Attorney General of the United States or the Department of Justice or his or its agents institute prosecution under Section 12 of the said Act, or that said enforcement authorities have threatened to institute any such prosecution and said plaintiffs fail further to allege wherein opportunity to the plaintiffs to defend in any such prosecution if any were brought or threatened would not afford a plain, adequate, complete and speedy remedy for the review and redress of any matter of law and fact raised in said complaint in connection with the alleged fear of prosecution under said Section 12 of the Act.

15. The National Labor Relations Act is valid and constitutional and the purpose of the proceedings instituted by the National Labor Relations Board thereunder is the determination in accordance with the provisions of the National Labor Relations Act of the question of whether or not any unfair labor practices affecting commerce is alleged in the complaint heretofore issued by said Board have been engaged in by the Bethlehem Shipbuilding Corporation, Ltd. The only

provisions of law for the determination of said question are the provisions of the National Labor Relations Act, and the method thereby prescribed being exclusive.

MALCOLM F. HALLIDAY,
Attorney for A. Howard Myers, individually and as Acting Regional Director for the First Region, Edmund J. Blake, individually and as Regional Attorney for the First Region, and Daniel M. Lyons, individually and as Trial Examiner of the National Labor Relations Board designated or to be designated by the National Labor Relations Board.

On the 23rd day of May, A. D. 1936, the following return of A. Howard Myers et al. to the Rule to Show Cause is filed:

RETURN OF A. HOWARD MYERS ET AL. TO THE RULE TO SHOW CAUSE.

[FILED MAY 23, 1936.]

To the Honorable the Judges of the District Court of the United States for the District of Massachusetts:

Now come the defendants, A. Howard Myers (erroneously referred to in the bill of complaint and subpoena as A. Howard Meyers), individually and as Acting Regional Director for the First Region, Edmund J. Blake, individually and as Regional Attorney for the First Region, and Daniel M. Lyons, individually and as Trial Examiner of the National Labor Relations Board designated or to be designated by the National Labor Relations Board, and for their return to the rule to show cause in the within action, state as follows:

1. For lack of knowledge defendants deny each and every allegation contained in paragraph 1 of the amended bill of complaint.

2. For lack of knowledge defendants deny each and every allegation contained in paragraph 2 of the amended bill of complaint.

3. Defendants deny each and every allegation contained in paragraph 3 of the amended bill of complaint.

4. For lack of knowledge defendants deny each and every allegation contained in paragraph 4 of the amended bill of complaint except that they admit that the National Labor Relations Act, among other things, provides for the appointment of the National Labor Relations Board, and except that they admit that in accordance with the terms of the National Labor Relations Act the President of the United States appointed J. Warren Madden as Chairman and member, and John M. Carmody and Edwin S. Smith as members of the National Labor Relations Board and that said persons have been duly qualified and are now acting as the National Labor Relations Board.

5. Defendants deny each and every allegation contained in paragraph 5 of the amended bill of complaint except that they admit that A. Howard Myers is a citizen of the United States and a resident of the Commonwealth of Massachusetts, and that he is Acting Regional Director of the National Labor Relations Board for the First Region, which includes Braintree and Quincy, having been appointed by the National Labor Relations Board, and except that they admit that he is acting by authority of the National Labor Relations Board, the National Labor Relations Act, and the Rules and Regulations of said Board promulgated pursuant to said Act, and except that they admit that he is an agent of the National Labor Relations Board to a limited degree. Further with respect to

paragraph 5 of the amended bill of complaint, defendants aver that the powers and duties of A. Howard Myers are set forth in the Rules and Regulations of the National Labor Relations Board, which Rules and Regulations are attached hereto, marked Exhibit A, and made a part hereof.

6. Defendants deny each and every allegation contained in paragraph 6 of the amended bill of complaint except that they admit that Edmund J. Blake is a citizen of the United States and a citizen and resident of the Commonwealth of Massachusetts, and except that they admit that he has been appointed and is now acting as Regional Attorney of the National Labor Relations Board for the First Region having been designated as such by the said Board; that he is acting under and by authority of the National Labor Relations Board, the National Labor Relations Act, and the Rules and Regulations of said Board promulgated pursuant to said Act, and except that they admit that he is an agent of the National Labor Relations Board to a limited degree, and except that they admit that he is authorized to participate at hearings before Trial Examiners as Regional Attorney. Further with respect to paragraph 6 of the amended bill of complaint, defendants aver that the powers and duties of Edmund J. Blake as Regional Attorney are set forth in the Rules and Regulations of the National Labor Relations Board.

7. Defendants deny each and every allegation contained in paragraph 7 of the amended bill of complaint except that they admit that Daniel M. Lyons is a citizen of the United States and a citizen and a resident of the Commonwealth of Massachusetts, and except that they admit that Daniel M. Lyons was appointed by the National Labor Relations Board as Trial Examiner in the proceedings which were scheduled for hearing on April 27, 1936, and that he acts under and by authority of the National Labor Relations

Board, the National Labor Relations Act, and the Rules and Regulations promulgated by said Board pursuant to said Act, and except that they admit that Daniel M. Lyons, as Trial Examiner, is an agent of the National Labor Relations Board to a limited degree, and except that they admit that when he is authorized to conduct hearings under the National Labor Relations Act, he is charged with the conduct of said hearings. Further with respect to paragraph 7 of the amended bill of complaint, defendants aver that the powers and duties of Daniel M. Lyons as Trial Examiner are set forth in the Rules and Regulations of said Board.

8. Defendants admit each and every allegation contained in paragraph 8 of the amended bill of complaint except that for lack of knowledge they deny that Bethlehem Shipbuilding Corporation, Ltd., employs at its Fore River Plant approximately 5,000 employees. Further with respect to paragraph 8 of the amended bill of complaint, defendants aver that said corporation is engaged in the sale and distribution, as well as the designing and building, of vessels, and further avers that said corporation is engaged in the production, sale and distribution of marine equipment.

9. For lack of knowledge defendants deny each and every allegation contained in paragraph 9 of the amended bill of complaint and aver that the allegations contained therein are wholly immaterial to and have no bearing on the issues before this Court.

10. For lack of knowledge defendants deny each and every allegation contained in paragraph 10 of the amended bill of complaint, and aver that the allegations contained therein are wholly immaterial to and have no bearing on the issues before this Court.

11. For lack of knowledge defendants deny each and every allegation contained in paragraph 11 of the amended bill of complaint, and aver that the allegations contained

therein are wholly immaterial to and have no bearing on the issues before this Court.

12. With respect to paragraph 12 of the amended bill of complaint defendants admit that Section 7, 8 (1) and 8 (2), and Section 10 (a) of the National Labor Relations Act are correctly set forth in said paragraph 12 of the amended bill of complaint, except that Section 8 (1) should be corrected to read as follows:

> "(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."

And except that Section 8 (2) should be corrected to read as follows:

> "(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay."

13. Defendants deny each and every allegation contained in paragraph 13 of the amended bill of complaint except that they admit that the Industrial Union of Marine and Shipbuilding Workers of America filed a charge, pursuant to Section 10 (b) of the National Labor Relations Act, charging that the Bethlehem Shipbuilding Corporation, Ltd., of Quincy, Massachusetts engaged in and is engaging in unfair labor practices within the meaning of Section 8, subdivisions (1) and (2) of the National Labor Relations Act, and charging that said unfair labor practices are affecting commerce, and except that they admit that the National Labor Relations Board issued its complaint against the Bethlehem Shipbuilding Corporation, Ltd., alleging that said corporation has engaged in and is now engaging in unfair labor

practices affecting commerce, within the meaning of Section 8, subdivisions (1) and (2) and Section 2, subdivisions (6) and (7) of the National Labor Relations Act, and except that they admit that said complaint, together with a notice of hearing thereon, were served upon said corporation and that said complaint and notice of hearing were signed by A. Howard Myers, Acting Regional Director for the First Region.

14. Defendants deny each and every allegation contained in paragraph 14 of the amended bill of complaint except that they admit that the complaint of the National Labor Relations Board, among other things, alleged that the Bethlehem Shipbuilding Corporation, Ltd., has dominated and interfered with and is dominating and interfering with a labor organization known as "Plan of Representation of Employees in Plants of the Bethlehem Shipbuilding Corporation, Ltd.". A copy of said complaint of the National Labor Relations Board, together with a copy of the notice of hearing, are attached hereto, marked Exhibit B, and made a part hereof.

15. Defendants admit each and every allegation contained in paragraph 15 of the amended bill of complaint.

16. Defendants admit each and every allegation contained in paragraph 16 of the amended bill of complaint.

17. For lack of knowledge defendants deny each and every allegation contained in paragraph 17 of the amended bill of complaint. Further with respect to paragraph 17, defendants aver that the allegations contained therein are wholly immaterial and have no bearing on the issues before this Court.

18. Defendants deny each and every allegation contained in paragraph 18 of the amended bill of complaint. Defendants aver that the allegations contained therein are

wholly immaterial and have no bearing on the issues before this Court. Further with respect to paragraph 18 of the amended bill of complaint, defendants aver that the sole purpose of the proceeding before the National Labor Relations Board is to determine whether or not the Bethlehem Shipbuilding Corporation, Ltd., has committed or is committing unfair labor practices affecting commerce within the meaning of the National Labor Relations Act, and a continuation of the proceedings before the Board will alleviate rather than stir up trouble and labor disturbances.

19. Defendants deny each and every allegation contained in paragraph 19 of the amended bill of complaint, and defendants aver that the allegations contained therein are wholly immaterial to and have no bearing on the issues before this Court. Further with respect to paragraph 19 of the amended bill of complaint, defendants aver that the complaint issued by the Board is directed to the Bethlehem Shipbuilding Corporation, Ltd., and not to the plaintiffs herein.

20. Defendants deny each and every allegation contained in paragraph 20 of the amended bill of complaint, and further with respect thereto, the defendants aver that the allegations contained therein with respect to plaintiffs' existing employment, terms of employment contracts and plaintiffs' right to bargain with their employer are wholly immaterial to and have no bearing on the issues before this Court. Further with respect to paragraph 20 of the amended bill of complaint, defendants aver that a continuation of the proceeding before the National Labor Relations Board would tend to protect the rights of plaintiffs.

21. Defendants deny each and every allegation contained in paragraph 21 of the amended bill of complaint. Further with respect thereto, defendants aver that plaintiffs will not be deprived of their legal rights, plaintiffs will not suffer

any damage, and have a plain, adequate, complete, and timely remedy at law.

22. Defendants deny each and every allegation contained in paragraph 22 of the amended bill of complaint.

23. Defendants deny each and every allegation contained in paragraph 23 of the amended bill of complaint.

24. Defendants deny each and every allegation contained in paragraph 24 of the amended bill of complaint.

25. For lack of knowledge defendants deny each and every allegation contained in paragraph 25 of the amended bill of complaint.

26. For lack of knowledge, defendants deny each and every allegation contained in paragraph 26 of the amended bill of complaint.

27. Defendants deny each and every allegation contained in paragraph 27 of the amended bill of complaint.

Further with respect to paragraph 27 of the amended bill of complaint, defendants aver that Bethlehem Shipbuilding Corporation, Ltd., is engaged in interstate commerce and is dependent upon interstate commerce for its existence, but whether or not said corporation is engaged in interstate commerce, and whether or not said corporation has committed unfair labor practices affecting commerce, must be determined in accordance with the provisions of the National Labor Relations Act and have no bearing on and are not material to the issues before this Court.

28. Defendants deny each and every allegation contained in paragraph 28 of the amended bill of complaint except that for lack of knowledge they deny that the Bethlehem Shipbuilding Corporation, Ltd., in conducting its business, does not directly affect interstate commerce, and except that

for lack of knowledge defendants deny that the National Labor Relations Act is inapplicable to said corporation.

Defendants further aver that:

29. The proceeding before the National Labor Relations Board, which the plaintiffs herein are seeking to enjoin, is a proceeding upon a complaint against the Bethlehem Shipbuilding Corporation, Ltd. The sole purpose of the proceeding is to determine whether or not the said corporation has committed unfair labor practices affecting commerce within the meaning of the National Labor Relations Act. The proceeding before the National Labor Relations Board can in no way be construed as a proceeding against the plaintiffs in the action now before this Court. In the proceeding before the Board these plaintiffs could not be required to do anything or to cease and desist from doing anything and can in no way be damaged by a continuation of the proceeding.

30. The determination of the questions involved in the proceeding before the National Labor Relations Board must be made in accordance with the provisions of the National Labor Relations Act.

31. The National Labor Relations Act is valid and constitutional and is the only law for the determination of the questions involved in the proceeding scheduled before the National Labor Relations Board, and the remedies provided by the National Labor Relations Act are exclusive.

32. The allegations in the amended bill of complaint with respect to the relationship between Bethlehem Shipbuilding Corporation, Ltd., and its employees are in no way material to the issues before this Court.

33. The issues before this Court are limited to a determination of whether or not plaintiffs will suffer irreparable damage cognizable in equity by a continuance of the

proceeding before the National Labor Relations Board, and whether or not plaintiffs have an adequate remedy.

34. The Bethlehem Shipbuilding Corporation, Ltd., is engaged in interstate commerce and is dependent upon interstate commerce for its existence, but whether or not the Bethlehem Shipbuilding Corporation, Ltd., is engaged in interstate commerce and whether or not said corporation has committed unfair labor practices affecting commerce must be determined in accordance with the provisions of the National Labor Relations Act and have no bearing on and are not material to the issues before this Court.

35. The hearing which was scheduled to be held on April 27th, and which undoubtedly will be held in the future, does not involve any threat, danger or possibility or harm or injury to the plaintiffs and is scheduled or will be scheduled in accordance with the terms of the National Labor Relations Act and the Rules and Regulations promulgated by the National Labor Relations Board, pursuant to said Act.

36. Defendants herein have no power to make any orders affecting the plaintiffs or to make any orders at all. The sole power to make orders under the National Labor Relations Act is within the province of the National Labor Relations Board, but in the proceeding now pending before the National Labor Relations Board, said Board cannot make any orders directed to plaintiffs.

37. The issuance of any order by the National Labor Relations Board against the Bethlehem Shipbuilding Corporation, Ltd., is neither imminent nor certain as the same is a matter of future determination; no order can be made by the National Labor Relations Board in any event until after a hearing is held with a full opportunity for the Bethlehem Shipbuilding Corporation, Ltd., to offer testimony, present evidence, examine and cross-examine witnesses and to raise any and all objections to the constitutionality of the

National Labor Relations Act and the jurisdiction of the National Labor Relations Board; and defendants further aver that the Bethlehem Shipbuilding Corporation, Ltd., may thereafter, depending upon the evidence in the hearing based upon Section 10 of the Act, do any of the following: (a) dismiss the complaint for lack of jurisdiction, in that the unfair labor practices charged therein may not be shown to affect commerce; (b) dismiss the complaint for lack of proof of the commission of or engaging in by the Bethlehem Shipbuilding Corporation, Ltd., of any of the unfair labor practices charged therein, and (c) dismiss the complaint in part and sustain the same with respect to the allegations which have been established and thereafter issue a final decision and a cease and desist order with respect to the unfair labor practices which have been established.

38. The issuance of a cease and desist order in the hearing based upon Section 10 of the Act, by the National Labor Relations Board to the Bethlehem Shipbuilding Corporation, Ltd., involves no restraint or legal compulsion upon the said corporation, no fine, penalty of forfeiture is incurred by the said corporation for non-compliance or disobedience of the same and no order of the Board is enforceable as such under the Act. Should the Board issue such order against the said corporation, the same would not become enforceable unless and until: (a) the Board applies to the appropriate Circuit Court of Appeals under Section 10 (e) of the National Labor Relations Act for an order directing compliance by the said corporation with such order or the said corporation petitions the Circuit Court of Appeals under Section 10 (f) of the Act for a review of the Board's order, either of the foregoing procedures being based upon the entire record of the proceedings before the Board with full opportunity to said corporation for a review of said order upon the merits and for determination of all of the constitutional and jurisdictional

questions; (b) the Circuit Court of Appeals reviews the case, sustains the order or some part thereof and issues its own final order. The enforceability of any order which may thereafter be made by the Circuit Court of Appeals would arise not by virtue of any of the provisions of the Act but by virtue of the powers inherent in the Circuit Court of Appeals as a duly constituted court of law to enforce its own orders.

39. No fines, forfeitures, restraints or penalties of any kind are involved and no order of the Board can be enforced unless and until the Circuit Court of Appeals has finally heard and determined the issues and has rendered its own final order, and no order can be rendered by the Circuit Court of Appeals until the aggrieved party has a full opportunity to be heard by said Court on all pertinent questions, constitutional, jurisdictional and otherwise. The Circuit Court of Appeals will not, in any event, issue an order directing compliance with the National Labor Relations Board order unless and until it determines (a) that the National Labor Relations Act is constitutional; (b) that the Act is applicable to the party aggrieved; and (c) that the evidence supports the findings and decision of the Board as to the merits.

40. The plaintiffs in the proceeding before the National Labor Relations Board are not parties complained of and no proceeding is directed against them and no order can be entered by the Board directed to them. Plaintiffs therefore cannot be damaged or aggrieved. Any person aggrieved by a final order of the Board under Section 10 (f) of the National Labor Relations Act may obtain a review of such order in the appropriate Circuit Court of Appeals of the United States.

41. The said amended bill of complaint fails to present a case or controversy for determination of this Honorable Court within the meaning of Article III, Sections (1) and (2) of the United States Constitution.

42. There are no allegations in the bill of complaint sufficient to show that the plaintiffs are threatened with or are in danger of suffering any great, irreparable or immediate injury cognizable in equity by reason of any of the matters set forth in the amended bill of complaint.

43. The plaintiffs have a plain, adequate and complete remedy under the provisions of the National Labor Relations Act with respect to the rights growing out of matters and things alleged in the amended bill of complaint.

44. It is beyond the power of the defendants or the Board to prosecute or attempt to prosecute the plaintiffs in any respect involving any fine, penalty or forfeiture.

45. The said amended bill of complaint fails to show an actual controversy within the meaning of the Federal Declaratory Judgment Act, Section 274-D of the Judicial Code (Section 400, Title 28, U. S. Code).

46. Large public interests are concerned herein and the issuance of an injunction will seriously embarrass the accomplishment of important governmental ends and will interfere with an agency of the Government in the performance of its duties.

47. The granting of the relief prayed for herein would constitute an invasion of the powers of the legislative and executive branches of the Federal Government and further a usurpation of the authority vested exclusively in the Circuit Court of Appeals by the National Labor Relations Act.

48. Attention is respectfully called to the bill of complaint filed by the plaintiffs herein in the first instance. That bill of complaint was verified by the plaintiffs herein, and on oath the plaintiffs stated that they had read the bill of complaint and knew the contents thereof, that the facts therein were true except as to such facts which were alleged on information and belief and as to those facts they believe

them to be true. It was alleged in paragraph 13 of the bill of complaint, after certain sections of the National Labor Relations Act had been quoted in paragraph 12 of said bill of complaint, which sections in no way were pertinent to the issues before this Court since they were in no way involved in the proceeding before the National Labor Relations Board, that "representatives of the Industrial Union of Marine and Shipbuilding Workers of America filed a petition for investigation and certification of representatives against the Bethlehem Shipbuilding Corporation, Ltd., pursuant to Section 9 (c) of the National Labor Relations Act with the National Labor Relations Board, as a result of which a complaint and notice of hearing, signed by the defendant A. Howard Myers, as Acting Regional Director for the First Region of the National Labor Relations Board, was served upon the Bethlehem Shipbuilding Corporation, Ltd." In the fourteenth paragraph of said bill of complaint it was also alleged on information and belief as follows:

> "The plaintiffs state that said Complaint and Notice of Hearing recited that there had been theretofore filed with the National Labor Relations Board a petition by said Industrial Union of Marine & Shipbuilding Workers of America, alleging that a question affecting commerce had arisen concerning the representation of the employees of said Bethlehem Shipbuilding Corporation, Ltd., at its plant at said Quincy and Braintree, and requesting that pursuant to authority granted in Section 9 (c) of the National Labor Relations Act, the National Labor Relations Board investigate such controversy and certify the name or names of the representatives that had been designated or selected by said employees."

In paragraph 15 of said bill of complaint, plaintiffs also alleged on information and belief as follows:

"the plaintiffs further say that said Complaint and Notice of Hearing further recited that it appeared to the National Labor Relations Board that a question affecting commerce had arisen concerning the representation of employees of the Bethlehem Shipbuilding Corporation, Ltd., and that said Notice of Hearing was, therefore, given that pursuant to Section 9 (c) of said Act, on the 27th of April, 1936, at 10 o'clock in the forenoon, in Room 1309 Federal Building, Boston, Massachusetts, a hearing would be conducted before the National Labor Relations Board by a Trial Examiner, to be designated by it in accordance with its rules and regulations upon the question of representation affecting commerce which was alleged to have arisen."

The plaintiffs, therefore, alleged in their bill of complaint:

(1) That the Industrial Union of Marine and Shipbuilding Workers of North America filed a petition for investigation and certification of representatives against the Bethlehem Shipbuilding Corporation, Ltd., pursuant to Section 9 (c) of the National Labor Relations Act;

(2) As a result of said petition, A. Howard Myers signed a complaint and notice of hearing which were served upon said corporation;

(3) In signing said complaint and notice of hearing, said A. Howard Myers was acting as agent of the National Labor Relations Board;

(4) Said complaint and notice of hearing recited that a petition had been filed by said Industrial Union;

(5) Said complaint and notice of hearing recited that said petition of said Industrial Union alleged that a question affecting commerce had arisen concerning the representation of said corporation's employees;

(6) Said complaint and notice of hearing recited that said petition of said Union requested that under Section 9 (c) the National Labor Relations Board investigate such controversy and certify the name or names of the representatives designated or selected by said corporation's employees;

(7) Said complaint and notice of hearing recited that a question affecting commerce had arisen concerning the representation of said corporation's employees;

(8) Said notice of hearing recited that pursuant to Section 9 (c) a hearing would be conducted before the National Labor Relations Board upon the question of representation affecting commerce which was alleged to have arisen.

Each of the above allegations made by plaintiffs in the bill of complaint which it filed in the first instance were absolutely false. They were false and untrue in spite of the fact that the plaintiffs read the bill of complaint and verified it. There is no proceeding pending before the National Labor Relations Board under Section 9 (c) of the National Labor Relations Act involving the employees of the Bethlehem Shipbuilding Corporation, Ltd., and there has never been any such proceeding. No petition for certification and investigation under Section 9 (c) has been filed by said Industrial Union. No hearing pursuant to Section 9 (c) has been scheduled. Defendant Myers at no time commenced any such proceeding either as an individual or as agent of the National Labor Relations Board. The Board at no time stated in a complaint that a question affecting commerce had arisen concerning the representation of employees, and at no time stated that a hearing would be scheduled upon the question of representation affecting commerce which was alleged to have arisen. Defendants state that the plaintiffs therein either executed a complaint involving facts about which they knew nothing and had no interest in, or that they deliberately took

liberties with this Court in making statements which were clearly and totally false.

WHEREFORE defendants move this Honorable Court that the temporary restraining order be dissolved, that the application for a preliminary injunction be denied, and the petition for a declaration that the National Labor Relations Act is unconstitutional, void and unenforceable, be denied, and the order to show cause be vacated, with costs.

A. HOWARD MYERS,
A. Howard Myers, Individually, and as Acting Regional Director for the First Region, National Labor Relations Board and as the National Labor Relations Board.

EDMUND J. BLAKE,
Edmund J. Blake, Individually and as Regional Attorney for the First Region, National Labor Relations Board, and as the National Labor Relations Board.

MALCOLM F. HALLIDAY,
Attorney for Defendants.

COMMONWEALTH OF MASSACHUSETTS,
COUNTY OF SUFFOLK, SS.:

A. Howard Myers, individually and as Acting Regional Director for the First Region, and Edmund J. Blake, individually and as Regional Attorney for the First Region, being duly sworn, depose and say that they are defendants in the within cause of action, that they have read the foregoing

return and know the contents thereof and that the same is true, except for those matters alleged therein on information and belief, and as to those matters, they believe them to be true.

A. HOWARD MYERS,
EDMUND J. BLAKE.

Subscribed and sworn to before me
this 23rd day of May, 1936.
THOMAS P. O'CONNOR,
[SEAL]

COMMONWEALTH OF MASSACHUSETTS,
COUNTY OF SUFFOLK, SS.:

MALCOLM F. HALLIDAY, being duly sworn, deposes and says:

That he is the attorney for Defendant Daniel M. Lyons, individually and as Trial Examiner of the National Labor Relations Board, designated or to be designated by the National Labor Relations Board; that he has read the foregoing return, knows the contents thereof, and is familiar with the facts referred to therein; that the contents of said return are true to the best of his knowledge, information and belief, and that he makes this affidavit because Daniel M. Lyons is out of the jurisdiction of this Court and is unable to do so himself.

MALCOLM F. HALLIDAY.

Subscribed and sworn to before me
this 22nd day of May, 1936.
JOHN E. LAWYER,
Notary Public District of Columbia.
My commission expires September 8, 1939.
[SEAL]

EXHIBIT "B"

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
First Region

In the matter of
BETHLEHEM SHIPBUILDING CORPORATION, LTD.
and
INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, LOCAL NO. 5

Case No. 1-C-25

COMPLAINT

It having been charged by the Industrial Union of Marine & Shipbuilding Workers of America, Local No. 5, 1511 Hancock Street, Quincy, Massachusetts that the Bethlehem Shipbuilding Corporation, Ltd., hereinafter called the respondent, has engaged in and is now engaging in certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, approved July 5, 1935, the National Labor Relations Board, by the Acting Regional Director for the First Region, as agent of the National Labor Relations Board, designated by the National Labor Relations Board Rules and Regulations, Series 1 (General Rules and Regulations), Article IV, Section 1, hereby alleges the following:

1. The respondent is and has been since October 30, 1917 a corporation organized under and existing by virtue of the laws of the State of Delaware, having its principal office and place of business in the City of Bethlehem, County of Northampton, State of Pennsylvania, and is now and has

continuously been engaged at a place of business in the City of Quincy, County of Norfolk, State of Massachusetts (hereinafter called the Fore River Plant) in the production, sale and distribution of boats, ships and marine equipment.

2. The respondent in the course and conduct of its business causes and has continuously caused large quantities of the raw materials used in the production of its boats, ships and marine equipment to be purchased and transported in interstate commerce from and through states of the United States other than the State of Massachusetts to the Fore River Plant in the State of Massachusetts, and causes and has continuously caused the boats, ships and marine equipment produced by it to be sold and transported in interstate commerce from the Fore River Plant in the State of Massachusetts to, into and through states of the United States other than the State of Massachusetts, all of the aforesaid constituting a continuous flow of trade, traffic and commerce among the several states.

3. The respondent, by its officers, agents and employees, while operating as described above, since March 1, 1923, down to and including the date of the filing of this complaint has dominated and interfered with a labor organization known as Plan of Representation of Employees in Plants of the Bethlehem Shipbuilding Corporation, Ltd., (hereinafter called the Employees' Representation Plan).

4. The respondent has dominated and interfered with and continues to dominate and interfere with the Employees' Representation Plan by causing its own representatives to be a component part of said Plan and has thereby exercised control over the deliberations and activities of the employees and their representatives in the operation of the Plan and thereby has prevented said employees from securing the benefits of genuine collective bargaining and has thereby engaged in and

is now engaging in an unfair labor practice within the meaning of Section 3, subdivision (1) of said Act.

5. By forming and assisting in the administration of said Employees' Representation Plan and by contributing financial and other support to it, the respondent has dominated and interfered with and is now dominating and interfering with the said labor organization, and thereby has engaged in and is now engaging in an unfair labor practice within the meaning of Section 8, subdivision (2) of said Act.

6. Such acts and unfair labor practices when engaged in by employers in the shipbuilding industry and by employers in other industries have led and tend to lead to labor disputes, strikes and other forms of industrial unrest in said shipbuilding industry and in other industries, which have the intent and necessary effect of burdening and obstructing trade, traffic and commerce among the several states in raw materials and manufactured and processed goods, and burdening and obstructing the free flow of such trade, traffic and commerce among the several states, by appearing in the current of such commerce among the several states, and by materially affecting, restraining, and controlling the flow of such raw materials and manufactured and processed goods from and into the channels of commerce among the several states, and the prices of such materials and goods in such commerce.

7. The aforesaid acts and unfair labor practices of respondent prevent the employees of respondent from possessing full freedom of association and actual liberty of contract and create an inequality of bargaining power between respondent and its employees, which inequality of bargaining power substantially burdens and obstructs trade, traffic and commerce among the several states in the raw materials and manufactured and processed goods of said industry, and substantially burdens and obstructs the free flow of trade,

traffic and commerce, and tends to aggravate recurrent business depressions among the several states, by depressing wage rates and the purchasing power of wage earners in said industry and by preventing the stabilization of competitive wage rates and working conditions within said industry and between said industry and other industries.

8. The aforesaid acts of respondent constitute unfair labor practices affecting commerce, within the meaning of Section 8, subdivisions (1) and (2) and Section 2, subdivisions (6) and (7), of said Act.

WHEREFORE, the National Labor Relations Board on the 13th day of April, 1936, issues its complaint against the Bethlehem Shipbuilding Corporation, Ltd., respondent herein.

NOTICE OF HEARING.

PLEASE TAKE NOTICE that on the 27th day of April, 1936, at 10 o'clock in the forenoon, in Room 1309, Post Office Building, Boston, Massachusetts, a hearing will be conducted before the National Labor Relations Board, by a Trial Examiner to be designated in accordance with said Rules and Regulations, Series I, Article IV, and Article II, Section 22, on the allegations set forth in the complaint attached hereto, at which time and place you will have the right to appear, in person or otherwise, and give testimony.

You are further notified that you have the right to file with the Acting Regional Director for the First Region, acting in this matter as the agent of the National Labor Relations Board, an answer to the complaint attached hereto, within five (5) days after the service of said complaint.

Enclosed herewith for your information is a copy of Rules and Regulations, Series I, made and published by the National Labor Relations Board pursuant to authority

granted in the National Labor Relations Act. Your attention is particularly directed to Article II of said Rules and Regulations.

IN WITNESS WHEROF the National Labor Relations Board has caused this, its complaint and notice of hearing, to be signed by the Acting Regional Director for the First Region on the 13th day of April, 1936.

A. HOWARD MYERS,
Acting Regional Director
for the First Region.

On the 27th day of May, A. D. 1936, the Honorable Elisha H. Brewster, District Judge, sitting, said cause comes on to be heard on the motion to dismiss and the prayer for preliminary injunction.

On the said 27th day of May, A. D. 1936, a memorandum of the court is announced.

On the 28th day of May, A. D. 1936, after due consideration thereon had, the following findings of fact is filed:

FINDINGS OF FACT ON HEARING FOR TEMPORARY INJUNCTION.

[Filed May 28, 1936]

[MEMORANDUM. Copy of findings of fact on hearing for temporary injunction is here omitted, as it is identical with one already printed in case No. 4321, Equity, on page 111 of this volume. JAMES S. ALLEN, CLERK.]

Thereupon, on the said 28th day of May, A. D. 1936, the following order granting preliminary injunction is entered:

ORDER GRANTING PRELIMINARY INJUNCTION.
May 28, 1936.

BREWSTER, J. This cause came on to be heard at this term upon an order to show cause issued May 4, 1936, upon application of the plaintiffs for a preliminary injunction upon the verified bill of complaint of the plaintiffs, and upon the affidavits in support of said bill of complaint made by Charles MacKenzie, William G. McDermott, Mark Hanabury and Thomas E. Barker and upon the affidavits of the defendants, A. Howard Myers and Edmund J. Blake in their "Return" and upon the affidavits filed in support of the bill of complaint in Equity, Number 4321, by H. E. D. Gould, A. B. Homer, Earle L. Pratt, W. H. Collins and S. W. Wakeman (which it was stipulated might be considered in this cause) and was argued by counsel; and it appearing to the Court that there is grave doubt whether the National Labor Relations Act of July 5, 1935, is not wholly unconstitutional; and it appearing that the issuance of a preliminary injunction is necessary to prevent immediate and irreparable damage, for the reason that the holding of any hearing for the purpose of determining whether or not the Bethlehem Shipbuilding Corporation, Ltd., has engaged at its Fore River Plant in any so-called "unfair labor practices" under the National Labor Relations Act, or taking any action with respect thereto, would involve expense to the plaintiffs which they could not recover would deprive the plaintiffs of the benefits of the Employees' Plan and seriously disturb the harmonious relations in the Fore River Plant; and it appearing uncertain whether the plaintiffs have a plain, adequate and complete remedy at law, and that immediate, continual and irreparable loss and damage to the plaintiffs will

result unless a preliminary injunction is granted herein as hereinafter set forth; it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

That said A. Howard Myers, Individually and as Acting Regional Director for the First Region, National Labor Relations Board, and Edmund J. Blake, Individually and as Regional Attorney for the First Region, National Labor Relations Board, and Daniel M. Lyons, Individually, and as Trial Examiner of the National Labor Relations Board, and each of their assistants, employees, agents and representatives, and each of them, be and they hereby are enjoined from holding or causing to be held any hearing or hearings for the purpose of determining whether the Bethlehem Shipbuilding Corporation, Ltd., or Charles MacKenzie, James E. Manning and Thomas E. Barker, Individually and respectively as Chairman, Vice Chairman and Secretary of Representation of Employees in Fore River Plant of the Bethlehem Shipbuilding Corporation, Ltd., plaintiffs in this action, have been or are engaged at the Plant of the Bethlehem Shipbuilding Corporation, Ltd., at Quincy and Braintree, in any violation of the National Labor Relations Act, and from undertaking any proceedings or taking any action whatsoever with respect thereto until the further order of the Court.

It is further ORDERED that the plaintiff forthwith give a penal bond in the sum of Five Hundred Dollars ($500.00) and that said temporary injunction remain in full force and effect until final hearing of this cause, or until said injunction is dissolved by order of the Court if the defendants prevail in their motion to dismiss.

By the Court,
JOHN E. GILMAN, JR.,
Deputy Clerk.

May 28, 1936.
E. H. B.
D. J.

[*Note.* On May 29, 1936, a bond in the sum of five hundred dollars ($500), dated May 29, 1936, was filed by Charles MacKenzie et al., as principals, the Maryland Casualty Company of Baltimore, Maryland, acting as surety, guaranteeing the payment of such costs and damages as may be suffered by the obligees if they are found to be wrongfully enjoined. JAMES S. ALLEN, *Clerk.*]

From the foregoing order granting preliminary injunction; the defendants claim an appeal to the United States Circuit Court of Appeals for the First Circuit on June 26, 1936, which appeal was allowed by the court on the same day.

MEMORANDUM.
May 27, 1936.

No. 4321, Eq. Bethlehem Shipbuilding Corpn. Ltd., v. A. Howard Myers et al.
No. 4324, Eq. Charles MacKenzie et al. v. A. Howard Myers et al.

[MEMORANDUM. As one memorandum was filed by the judge, applicable to both cases, copy is here omitted, as it will be found printed in case No. 4321, Equity, on page 117 of this volume. JAMES S. ALLEN, CLERK.]

ASSIGNMENT OF ERRORS.
[FILED JUNE 26, 1936.]

[MEMORANDUM. Copy of assignment of errors is here omitted, as it is identical with one already printed in case No. 4321, Equity, on page 136 of this volume. JAMES S. ALLEN, CLERK.]

ORDER STAYING PROCEEDINGS PENDING APPEAL.
July 13, 1936.

[MEMORANDUM. Copy of above order is here omitted, as it is identical with the one already printed in case No. 4321, Equity, on page 139 of this volume. JAMES S. ALLEN, CLERK.]

DEFENDANTS' SUBSTITUTED PRAECIPE.
[FILED JULY 17, 1936.]

To the Clerk of said Court:

You will please include in the record on appeal in the above-entitled cause the following instruments filed in the said cause, together with the exhibits herein mentioned:

May 4, 1936	Subpoena in Equity and Marshal's Return thereon.
May 4, 1936	Restraining Order and Notice to Show Cause why Preliminary Injunction should not issue, and Marshal's Return thereon.
May 4, 1936	Special appearance of R. B. Watts.
May 7, 1936	Plaintiff's Motion to Amend Bill of Complaint and Substitute Bill of Complaint for Restraining Order and Injunction and Petition for Declaratory Judgment.
May 11, 1936	Special Appearance.
May 12, 1936	Affidavit of Charles MacKenzie.
May 12, 1936	Affidavit of William Harvey.
May 12, 1936	Affidavit of William G. McDermott.
May 12, 1936	Affidavit of Mark Hanabury.
May 13, 1936	Affidavit of Thomas E. Barker.
May 14, 1936	Petition of the Plaintiffs to continue Restraining Order in force.

May 14, 1936	Order continuing Restraining Order in force.
May 19, 1936	Petition of the Plaintiffs to continue Restraining Order in force.
May 19, 1936	Order continuing Restraining Order in force.
May 19, 1936	Supplemental Affidavit of Charles MacKenzie.
May 19, 1936	Supplemental Affidavit of William G. McDermott.
May 19, 1936	Supplemental Affidavit of Thomas E. Barker.
May 22, 1936	Motion to Quash Subpoena.
May 22, 1936	Special Appearance.
May 22, 1936	Motion to Dismiss the Bill of Complaint.
May 23, 1936	Return of A. Howard Myers and Edmund J. Blake.
May 27, 1936	Memorandum Opinion.
May 28, 1936	Findings of Fact and Conclusions of Law.
May 28, 1936	Order Granting Preliminary Injunction.
June 1, 1936	Bond Filed in Connection with Order Granting Preliminary Injunction.
June 26, 1936	Recital of filing of Petition of Appeal and allowance thereof, Assignment of Errors, Citation, Order Staying Proceedings pending appeal, Praecipe.
May 12, 1936	Affidavits of H. E. D. Gould, A. B. Homer, Earl L. Pratt, W. H. Collins, S. W. Wakeman, filed in Equity No. 4321, and agreed to be a part of this record.

CHARLES FAHY.
ROBERT B. WATTS.
Attorneys for the Defendants.

Service and Waiver of Counter Praecipe.

Service of the within Praecipe by receipt of copy thereof is hereby acknowledged and plaintiffs hereby waive the filing and serving of a counter praecipe and consent to a settlement of the record on the within praecipe.

Dated July 17th, 1936.

B. A. BRICKLEY,
Attorney for Plaintiffs.

A citation on appeal was issued on June 26, 1936, being made returnable in the U. S. Circuit Court of Appeals on July 27, 1936. Service of said citation was duly acknowledged by B. A. Brickley, attorney for plaintiffs.

MEMORANDUM.
July 22, 1936.

BREWSTER, J. This suit, brought by plaintiffs in their representative capacity as officers of an organization of employees of the Bethlehem Shipbuilding Corporation, Ltd., called Employees' Representation Plan, was heard with Equity No. 4321, Bethlehem Shipbuilding Corp. Ltd., against the same defendants. Plaintiffs ask for a temporary injunction upon the bill and affidavits. Defendants have moved to dismiss. The issues raised are the some as those considered in my opinion this day filed in Equity No. 4321, and need not be considered here.

The allegations not appearing substantially in the Bethlehem Shipbuilding case relate to the irreparable injury which will attend the alleged unlawful acts threatened by defendants. These, summarized, are that the employees fear the consequences of interference with their contract relations with their employer or with the status of the organization;

that the threatened investigation will discredit the Representation Plan and deprive employees of the benefits of it; and, generally, will foment disturbances where now there are harmonious relations between employees and employer.

While the equities of these plaintiffs may not appear as great, or as clear, as those of the plaintiff in the Shipbuilding case, it is a matter of little consequence what disposition is made of their motion for injunction since the defendants are enjoined in the other case. Nevertheless, the investigation into the charges made against their employer involves the organization represented by plaintiffs, and would require attendance of members at hearings and the production of its books and records.

Under all the circumstances, I have decided, for the purpose of the record, to treat alike the two cases, and, therefore, will allow the injunction, now outstanding, to continue in force, and will deny defendants' motion to dismiss.

AGREEMENT.

[Filed September 14, 1936.]

To the Clerk.

We hereby agree and request that in addition to the papers already specified in the praecipes of both parties as constituting the record on appeal in the above entitled case, the opinion of the Court dated July 22, 1936, be added and included.

B. A. BRICKLEY,
Attorney for Plaintiffs.
ROBERT B. WATTS,
Attorney for Defendants.

Approved September 19, 1936.
ELISHA H. BREWSTER,
U. S. District Judge.

STIPULATION REGARDING RECORD.

[Filed September 17, 1936.]

It is stipulated and agreed by and between counsel in this case that no witnesses were called and that the case was heard entirely on the bill of complaint and petition of the plaintiff, the return and motion to dismiss of the defendants, and affidavits and exhibits as included in the record on appeal, and that the record on appeal, as prepared, contains everything upon which the Court heard the application for the preliminary injunction. For the foregoing reasons, no narrative form of evidence is submitted as described in Paragraph b of Equity Rule 75.

B. A. BRICKLEY,
Attorney for Plaintiffs.
ROBERT B. WATTS,
Attorney for Defendants.

Approved September 19, 1936.
ELISHA H. BREWSTER,
U. S. District Judge.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
DISTRICT OF MASSACHUSETTS, ss.:

I, James S. Allen, Clerk of the District Court of the United States for the District of Massachusetts, do hereby certify that the foregoing is the transcript of the record on the appeal of the defendants, including true copies of such proofs, entries and papers on file as have been designated by praecipe and of the opinion dated July 22, 1936, included by stipulation of parties in the case entitled,

No. 4324, Equity Docket,

CHARLES MacKENZIE, Individually and as Chairman, JAMES E. MANNING, Individually and as Vice Chairman, THOMAS E. BARKER, Individually and as Secretary of the Representation of Employees in the Fore River Plant of the Bethlehem Shipbuilding Corporation, Ltd.,

PLAINTIFFS,

v.

A. HOWARD MYERS, EDMUND J. BLAKE and DANIEL M. LYONS, Individually and as the National LaborRelations Board,

DEFENDANTS,

now pending in said District Court.

And I further certify that transmitted herewith are the originals of the petition for appeal and the citation on appeal with the acknowledgment of service thereon.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court, at Boston, in said District, this 26th day of September, A. D. 1936.

[SEAL]

JAMES S. ALLEN, CLERK.

[MEMORANDUM. Orders of enlargement of time for docketing cases to, and including, October 24, 1936, are here omitted. A. I. CHARRON, *Clerk.*]

PROCEEDINGS IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

October Term, 1936

No. 3189

A. HOWARD MYERS ET AL., INDIVIDUALLY AND AS THE NATIONAL LABOR RELATIONS BOARD, DEFENDANTS, APPELLANTS

v.

BETHLEHEM SHIPBUILDING CORPORATION, LTD., PLAINTIFF, APPELLEE

No. 3190

A. HOWARD MYERS ET AL., INDIVIDUALLY AND AS THE NATIONAL LABOR RELATIONS BOARD, DEFENDANTS, APPELLANTS

v.

CHARLES MACKENZIE ET AL., PLAINTIFFS, APPELLEES

On January 7 and 8, 1937, these cases came on to be heard together and was fully heard by the court, Honorable George H. Bingham, Honorable Scott Wilson, and Honorable James M. Morton, Jr., Circuit Judges, sitting.

Thereafter, to wit, on the twelfth day of February, A. D. 1937, the following opinion of the Court was filed:

Appeals from the District Court of the United States for the District of Massachusetts

Before BINGHAM, WILSON, and MORTON, JJ.

Opinion of the court

February 12, 1937

MORTON, J.: These are two suits in equity to enjoin officials of the National Labor Relations Board from proceeding with hearings on a complaint against the Shipbuilding Corporation alleging unfair labor practices. The District Judge granted injunctions and the defendants have appealed.

The bill of the Shipbuilding Corporation alleges that it is engaged in shipbuilding with a plant at Fore River, Massachusetts, at which about five thousand persons are employed; that besides building ships it does a small amount of other manufacturing; that on 14 April, 1936, it was served with a copy of complaint and notice of hearing from the National Labor Relations Board; that the com-

plaint charged that the Shipbuilding Corporation was dominating and interfering with a labor organization formed by its employees and was preventing its employees from securing the benefits of genuine collective bargaining; that notice of hearing to take place on 27 April, 1936, and subpoenas were served upon the plaintiff; that for many years there has been in existence at the plaintiff's plant an organization of its employees known as the Plan of Employees Representation, referred to as the "Plan", with which ninety-six percent of the employees at said plant are affiliated; that the relations between the plaintiff and its employees are furthered and protected by said Plan; that for many years such relations have been amicable and satisfactory on both sides; that the present complaint is made by persons in no way connected with the plaintiff's business, either as workmen or in any other capacity; that a similar complaint was made in September 1934 to the Old Labor Board; that it was fully heard at great trouble and expense to the plaintiff and by a decision on 13 February, 1935, the Old Labor Board unanimously held that the complaint was not sustained and dismissed it; that there has been no change in the relations between the plaintiff and its employees since that date. The bill further alleges irreparable injury and inadequacy of legal remedy; it also alleges that the National Labor Relations Act is unconstitutional on several grounds.

The second bill is filed by the officers of the Plan of Employees Representation. It recites that its members have oral contracts with the shipbuilding company under which they are employed there; that harmonious relations exist between the employees and the management; that all employees who have been on the payroll of the corporation over sixty days prior to an election and are of requisite age are eligible to vote and that ninety-six percent of the employees did vote at the last election of its officers; that they desire no change to be made in their status and no interference by the National Relations Board, but on the contrary desire to retain their individual rights and freedom in respect to bargaining with their employer; that the proposed hearings will impair the amicable relations between the employees and the employer and will do irreparable injury. The bill also alleges the unconstitutionality of the statute. The District Judge found the allegations of fact in the bills to be true. He also found that the plaintiffs would suffer irreparable injury if the proposed hearings were held and that there was no plain adequate and complete remedy at law.

Motions to dismiss in each case were filed by the defendants and after hearing were denied by the District Judge. The present appeal, however, brings up only the orders granting injunctions.

The case is by no means of the first impression. Cases involving the powers and jurisdiction of the National Labor Relations Board have already arisen and been decided in the second, fourth, fifth, sixth, eighth, and ninth circuits, some as in this case on proceedings to enjoin hearings, some on petitions to review orders made by the Board, and some on petitions by the Board for enforcement of its

orders. Where the question was presented it has uniformly been held that the Act does not apply to manufacturers. Such persons are not engaged in interstate commerce and their relations with their employees are within the jurisdiction of the State rather than of the national government. National Labor Relations Board v. Friedman-Harry Marks Clothing Co., 85 Fed. (2d) 1 (C. C. A. 2); Foster Bros. Mfg. Co. v. National Labor Relations Board, 85 Fed. (2d) 984 (C. C. A. 4); National Labor Relations Board v. Jones & Laughlin Steel Corporation, 83 Fed. (2d) 998 (C. C. A. 5); Fruehauf Trailer Co. v. National Labor Relations Board, 85 Fed. (2d) 391 (C. C. A. 6); Pratt v. Stout, 85 Fed. (2d) 172 (C. C. A. 8); National Labor Relations Board v. McKay Radio & Telegraph Co. (C. C. A. 9), January 1937. Where an employer is engaged in interstate commerce the Board has jurisdiction and its orders have been enforced. National Labor Relations Board v. Associated Press, 85 Fed. (2d) 56 (C. C. A. 2); National Labor Relations Board v. Washington, Virginia & Maryland Coach Co., 85 Fed. (2d) 990 (C. C. A. 4). It would serve no useful purpose to repeat the elaborate discussions of law which are contained in the opinions in some of these cases, particularly in Pratt v. Stout, Foster Bros. v. National Labor Relations Board, National Labor Relations Board v. Jones & Laughlin Co., and National Labor Relations Board v. Friedman-Harry Marks Clothing Co.

Notwithstanding this great weight of adverse opinion, the respondents contend that they ought to have been allowed to go on with the hearings and that the injunctions ought not to have been granted because the Act provides an adequate legal remedy, and because the injury with which the plaintiff claims to be threatened is not, legally speaking, irreparable. On the present state of the law there would seem to be only slight probability that any order which might be made by the Board in this case would be enforced. It is altogether probable that the Board is attempting to act on a complaint not within its jurisdiction. This appears on the face of the complaint wherein the business of the shipbuilding company is described as follows:

"2. The respondent in the course and conduct of its business causes and has continuously caused large quantities of the raw materials used in the production of its boats, ships, and marine equipment to be purchased and transported in interstate commerce from and through states of the United States other than the State of Massachusetts to the Fore River Plant in the State of Massachusetts, and causes and has continuously caused the boats, ships, and marine equipment produced by it to be sold and transported in interstate commerce from the Fore River Plant in the State of Massachusetts to, into, and through states of the United States other than the State of Massachusetts, all of the aforesaid constituting a continuous flow of trade, traffic, and commerce among the several states."

The employees of such a business are not engaged in interstate commerce nor in a business within the jurisdiction of the Board and,

if not, the Board is acting without authority and in violation of law. (Cases supra.) See also Carter v. Carter Coal Co., 298 U. S. 238, 303, 304.

On the somewhat unusual facts in this case, viz, the long established plant association and the long established amicable and satisfactory relations between the plaintiff and its employees fostered by it, it might well be held that irreparable injury would be caused by an investigation calculated to disturb those relations and that neither plaintiff had an adequate remedy at law. Both the Shipbuilding Company and its employees have a right that the established friendly relations between them shall not be injured without legal justification. It cannot be said that the District Judge erred in finding and ruling that the plaintiffs had no adequate remedy at law or in finding and holding that danger of irreparable injury was shown and that, considering the doubt as to the Board's jurisdiction, the plaintiffs were entitled to preliminary injunctions.

The decrees of the District Court are affirmed.

On the same day, to wit, February 12, 1937, the following Final Decree was entered in each case:

Final decree

February 12, 1937

This cause came on to be heard January 7 and 8, 1937, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now, to wit, February 12, 1937, here ordered, adjudged, and decreed as follows: The decree of the District Court is affirmed.

By the Court:

ARTHUR I. CHARRON, *Clerk.*

Thereafter, to wit, on February 26, 1937, the following petition for rehearing was filed:

Petition of appellants for rehearing

The appellants respectfully petition this Honorable Court for a rehearing in the above entitled causes, and in support of such petition respectfuly show to the Court as follows:

1. Heretofore, on February 12, 1937, this Court entered its opinion and judgment affirming decrees entered on May 28, 1936, by Judge Brewster in the United States District Court for the District of Massachusetts (No. 3189, R. 112–114; No. 3190, R. 220–221), granting the motions of the respective appellees for preliminary injunctions restraining the appellants from conducting a hearing pursuant to the provisions of Section 10 of the National Labor Relations Act, hereinafter referred to as the Act (49 Stat. 449, 29 U. S. C., §§ 151 et seq.).

2. In its opinion rendered on February 12, 1937, this Court appears not to have considered the questions whether the method prescribed by the Act for ascertaining whether or not the National Labor Relations Board (hereinafter referred to as the Board) has jurisdiction over the appellee Bethlehem Shipbuilding Corporation, Ltd., is adequate and exclusive. The adequacy and exclusiveness of that method for determining the constitutional and jurisdictional questions sought to be raised by the appellees herein are two of the principal issues raised on these appeals. (See Assignment of Errors (R. 136, 222): # 9 (R. 137); # 16 (R. 138); # 17 (R. 138).) In its opinion this Court demonstrated that the Act has a field for constitutional application and that the Board is a body having a constitutional function, to paraphrase the language of the opinion of the Fifth Circuit Court of Appeals in Bradley Lumber Co. v. National Labor Relations Board, 84 F. (2d) 97, cert. den. 57 S. Ct. 21. Thus, the whole issue is, shall the question of the jurisdiction of the Board be determined in the first instance before the Board or before the District Court? Until a hearing is had, and the facts determined, it is manifestly impossible to ascertain whether or not the Board has jurisdiction. The Act prescribes a method for determining that question, and the appellants respectfully submit that that method is exclusive and adequate.

3. In its said judgment, this Court appears not to have considered or decided the question whether damage of the kind alleged in the appellees' bills of complaint is, as a matter of law, cognizable in equity. This question is one of the principal issues raised on these appeals (Assignment of Errors: Nos. 7, 8, 10, and 11, R. 137). In each of two suits similar to the ones at bar the appellee Bethlehem Shipbuilding Corporation sought to enjoin the Board and its agents from proceeding against it under the Act. The allegations of the bills of complaint in those two cases were nearly identical to the allegations of the bills herein. In each case it was held that the damage alleged was not sufficient to establish a case for equitable relief. (Bethlehem Shipbuilding Corp., Ltd., v. Nylander, 14 F. Supp. 201 (S. D. Cal.); Bethlehem Shipbuilding Corp., Ltd. v. Madden, Ct. of App. D. C., opinion of Court was printed as Appendix B of Brief for Appellants herein.)

4. In a long series of cases it has been held that no irreparable injury cognizable in equity will result from the procedure authorized by the Act. This principle appears to have been recognized and affirmed by the Supreme Court of the United States, and has been clearly decided by the United States Court of Appeals for the District of Columbia, the Second, Fifth, Sixth, Seventh, and Ninth Circuit Courts of Appeals, and the overwhelming majority of District Courts. (See Brief for Appellants herein, pp. 41–47.) It is significant that the decision of the Seventh Circuit Court of Appeals in Clark v. A. J. Lindemann and Hoverson Co. and six other cases (decided January 12, 1937), was on appeals from orders of the District Courts granting preliminary injunctions, whereas the decisions

of the other Courts of Appeals were on appeals from orders denying injunctions.

5. It is a well settled principle that when one or more Circuit Courts of Appeals have decided a question in a certain way and the only decision of the Supreme Court thereon is not inconsistent therewith, the other Courts of Appeals will follow the decisions of the first to decide the question. Fairfield Floral Co. v. Bradbury, 87 F. 415 (C. C. D. Me.); In re Spinwell Estate, 90 F. 675 (C. C. A. 3); Bright v. Arkansas, 249 F. 950 (C. C. A. 8.). In the first case cited Judge Putnam said (p. 417):

"If I were free to follow my own judgment, I should say that congress, neither directly, nor through the postmaster general or any one else, has any constitutional authority to impose the penalty of forfeiture of the use of the mails of the United States at least without a trial. But I am not sure that I will be able to follow my own convictions in this case, even if on a final hearing they remain as they now stand. I am not sure that I will not be bound by the decision of the court of appeals in the Sixth circuit (Association v. Zumstein, 15 C. C. A. 153, 67 Fed. 1000), when the case comes to a final hearing. My own view is that the decisions of the court of appeals in one circuit should ordinarily be followed quite implicitly by the courts in other circuits. The case in the Sixth circuit does not seem to have been taken to the supreme court. I cannot find anything to indicate that it was taken up by writ of error or otherwise, and it seems to have been left on the decision of the court of appeals; so that it stands to-day the highest judicial authority which we have on the validity of the statute."

The Eighth Circuit Court of Appeals succinctly stated the principle in the Bright case, supra:

"In deciding questions of policy and practice which involve no vital moral issue, certainty in the law and uniformity of decision are often more essential to the wise administration of justice and to the interests of business men than a particular policy or practice. Where the correct decision of such a question is doubtful, and one of the United States Circuit Courts of Appeals has decided it in a considered opinion, it is the duty of the others to follow that decision, unless it clearly appears to them, or to some of them, to be unfair or unwise, and it is the duty of the courts at all times, in the consideration of such issues, to lean towards uniformity of decision and practice."

6. As stated in the Brief for Appellants herein (pp. 41-2), the Supreme Court of the United States, on October 12, 1936, denied certiorari to review the decision of the Fifth Circuit Court of Appeals in Bradley Lumber Co. v. National Labor Relations Board, 84 F. (2d) 97. In that case the Circuit Court of Appeals affirmed the decree of the District Court denying a preliminary injunction and dismissing the bill to enjoin the Board from conducting a hearing pursuant to the provisions of the Act, notwithstanding the

allegations of the bill that the plaintiff lumber company was engaged in the purely local business of manufacturing.

There are now pending in the Supreme Court petitions for certiorari to review the decision of the United States Court of Appeals for the District of Columbia in Heller Bros. Co. v. Lind, and six other cases, including Bethlehem Shipbuilding Corp., Ltd. v. Madden, decided November 9, 1936. (A printed copy of the decision of the Court is attached to the Brief for Appellants herein as Appendix B.) Appellee Bethlehem Shipbuilding Corporation, Ltd. is one of the petitioners before the Supreme Court, having filed its petition for certiorari on February 5, 1937. In these cases the Court of Appeals for the District of Columbia affirmed decrees of the District Court for the District of Columbia denying preliminary injunctions and holding the bills of complaint to be without equity. Appellants have been notified that petitions for certiorari to review the decision of the Seventh Circuit Court of Appeals in Clark v. J. I. Case Co., and Clark v. Marathon Electric Mfg. Corp. (and five other cases) will shortly be filed in the Supreme Court by J. I. Case Company and Marathon Electric Manufacturing Corporation. In these cases the appeals were taken by representatives of the Board from decrees of the District Courts granting preliminary injunctions. In each case the Seventh Circuit Court reversed the decree and remanded the cause to the District Court with directions to dissolve the injunction and dismiss the bill for want of equity. The action which the Supreme Court will take on these petitions will be determinative of the issues raised on the appeal in the case at bar.

Respectfully,

A. HOWARD MYERS,
EDMUND J. BLAKE,
DANIEL M. LYONS,
Defendants-Appellants,
By CHARLES FAHY,
General Counsel, National Labor Relations Board,
ROBERT B. WATTS,
Associate General Counsel,
ROBERT S. ERDAHL,
Attorney,
Attorneys for Defendants-Appellants.

FEBRUARY 25, 1937.

Certificate of counsel

Comes now Robert B. Watts, one of the attorneys for the defendants-appellants, and certifies that he has read and knows the contents of the foregoing petition, and that said petition is well founded and is not filed for the purpose of delay.

ROBERT B. WATTS,
Attorney for Defendants-Appellants.

Thereafter, to wit, on April 5, 1937, the foregoing petition for rehearing was denied.

Thereafter, to wit, on April 13, 1937, mandate was stayed until further order of court.

Thereafter, to wit, on April 20, 1937, the following motion for leave to file a petition for rehearing was filed:

Appeals from the District Court of the United States for the District of Massachusetts

Motion of appellants for leave to file petition for rehearing

Now come the appellants in the above-entitled causes and, upon the facts alleged in the attached Petition for Rehearing, move this Honorable Court for leave to file said Petition for Rehearing, and for an order permitting oral argument thereupon.

Appellants further move, upon the grounds stated in said Petition for Rehearing, that the mandate herein be further stayed pending the determination of this Court upon this motion and the said Petition for Rehearing.

Dated: April 19, 1937.

CHARLES FAHY,
ROBERT B. WATTS,
Attorneys for Appellants.

Petition for rehearing

The appellants respectfully petition this Honorable Court for a rehearing in the above-entitled causes, and in support of such petition respectfully show to the Court as follows:

1. Heretofore, on February 12, 1937, this Court entered its opinion and judgment affirming decrees entered on May 28, 1936, by Judge Brewster in the United States District Court for the District of Massachusetts (No. 3189, R. 112–114; No. 3190, R. 220–221), granting the motions of the respective appellees for preliminary injunctions restraining the appellants from conducting a hearing pursuant to the provisions of Section 10 of the National Labor Relations Act (49 Stat. 449, U. S. C. Supp. I, Tit. 29, §§ 151 et seq.), hereinafter referred to as the Act.

2. This Court places its affirmance of the said decrees of the District Court upon the following grounds stated in the opinion of this Court rendered herein on February 12, 1937 (88 F. (2d) 154, 155–156):

"* * * Cases involving the powers and jurisdiction of the National Labor Relations Board have already arisen and been decided in the second, fourth, fifth, sixth, eighth, and ninth circuits, some as in this case on proceedings to enjoin hearings, some on petitions to review orders made by the Board, and some on petitions by the Board for enforcement of its orders. Where the question was pre-

sented it has uniformly been held that the Act does not apply to manufacturers. Such persons are not engaged in interstate commerce and their relations with their employees are within the jurisdiction of the State rather than of the national government. National Labor Relations Board v. Friedman-Harry Marks Clothing Co., 85 Fed. (2d) 1 (C. C. A. 2); Foster Bros. Mfg. Co. v. National Labor Relations Board, 85 Fed. (2d) 984 (C. C. A. 4); National Labor Relations Board v. Jones & Laughlin Steel Corporation, 83 Fed. (2d) 998 (C. C. A. 5); Fruehauf Trailer Co. 1. National Labor Relations Board, 85 Fed. (2d) 391 (C. C. A. 6); Pratt v. Stout, 85 Fed. (2d) 172 (C. C. A. 8); National Labor Relations Board 1. McKay Radio & Telegraph Co. (C. C. A. 9) January 1937. Where an employer is engaged in interstate commerce the Board has jurisdiction and its orders have been enforced. National Labor Relations Board v. Associated Press, 85 Fed. (2d) 56 (C. C. A. 2); National Labor Relations Board v. Washington, Virginia & Maryland Coach Co., 85 Fed. (2d) 990 (C. C. A. 4). It would serve no useful purpose to repeat the elaborate discussions of law which are contained in the opinions in some of these cases, particularly in Pratt v. Stout, Foster Bros. v. National Labor Relations Board, National Labor Relations Board v. Jones & Laughlin Co., and National Labor Relations Board v. Friedman-Harry Marks Clothing Co.

"Notwithstanding this great weight of adverse opinion the respondents contend that they ought to have been allowed to go on with the hearings and that the injunctions ought not to have been granted because the Act provides an adequate legal remedy and because the injury with which the plaintiff claims to be threatened is not, legally speaking, irreparable. On the present state of the law there would seem to be only slight probability that any order which might be made by the Board in this case would be enforced. It is altogether probable that the Board is attempting to act on a complaint not within its jurisdiction. This appears on the face of the complaint wherein the business of the shipbuilding company is described as follows:

"'2. The respondent in the course and conduct of its business causes and has continuously caused large quantities of the raw materials used in the production of its boats, ships, and marine equipment to be purchased and transported in interstate commerce from and through states of the United States other than the State of Massachusetts to the Fore River Plant in the State of Massachusetts and causes and has continuously caused the boats, ships, and marine equipment produced by it to be sold and transported in interstate commerce from the Fore River Plant in the State of Massachusetts to, into, and through states of the United States other than the State of Massachusetts, all of the aforesaid constituting a continuous flow of trade, traffic, and commerce among the several states.'

"The employees of such a business are not engaged in interstate commerce nor in a business within the jurisdiction of the Board and if not the Board is acting without authority and in violation of law.

(Cases supra.) (See also Carter v. Carter Coal Co., 298 U. S. 238, 303, 304.

"On the somewhat unusual facts in this case, viz, the long established plant association and the long established amicable and satisfactory relations between the plaintiff and its employees fostered by it, it might well be held that irreparable injury would be caused by an investigation calculated to disturb those relations and that neither plaintiff had an adequate remedy at law. Both the Shipbuilding Company and its employees have a right that the established friendly relations between them shall not be injured without legal justification. It cannot be said that the District Judge erred in finding and ruling that the plaintiffs had no adequate remedy at law or in finding and holding that danger of irreparable injury was shown and that, considering the doubt as to the Board's jurisdiction, the plaintiffs were entitled to preliminary injunctions."

Summarizing the above-quoted opinion of this Court, this Court placed its affirmance of the injunction decrees of the District Court upon the ground that there was doubt as to the constitutionality of the Act and the jurisdiction of the Board, and upon the further ground that appellees were threatened with irreparable injury for which they had no adequate remedy at law.

3. Intervening decisions of the United States Supreme Court are in direct conflict with the bases of this Court's decision herein as set forth in paragraph 2 hereof.

On April 12, 1937, the United States Supreme Court reversed the judgments entered in three of the cases referred to and relied upon by this Court in its said opinion herein of February 12, 1937, as set forth in paragraph 2 hereof (National Labor Relations Board v. Jones & Laughlin Steel Corporation; Same v. Fruehauf Trailer Co.; Same v. Friedman-Harry Marks Clothing Co., Nos. 419, 420, 421, 422, 423, October Term, 1936), and finally sustained in said cases the validity and applicability of the Act and the jurisdiction and authority of the Board created thereunder. Furthermore, these intervening decisions of the Supreme Court control all the decisions relied upon by this Court. In the opinion of the Supreme Court in National Labor Relations Board v. Jones & Laughlin Steel Corporation (No. 419), Mr. Chief Justice Hughes, speaking for the Court, said, in part:

"It is thus apparent that the fact that the employees here concerned were engaged in production is not determinative. The question remains as to the effect upon interstate commerce of the labor practice involved. In the Schechter case, supra, we found that the effect there was so remote as to be beyond the federal power. To find [illegible] to find it 'almost everywhere', a result inconsistent with the maintenance of our federal system. In the Carter case, supra, the Court was of the opinion that the provisions of the statute relating to production were invalid upon several grounds—that there was improper delegation of legislative power, and that the requirements not only went beyond any sus-

tainable measure of protection of interstate commerce but were also inconsistent with due process. These cases are not controlling here.

"Fourth. Effects of the unfair labor practice in respondent's enterprise.—Giving full weight to respondent's contention with respect to a break in the complete continuity of the 'stream of commerce' by reason of respondent's manufacturing operations, the fact remains that the stoppage of those operations by industrial strife would have a most serious effect upon interstate commerce. In view of respondent's far-flung activities, it is idle to say that the effect would be indirect or remote. It is obvious that it would be immediate and might be catastrophic. We are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum. Because there may be but indirect and remote effects upon interstate commerce in connection with a host of local enterprises throughout the country, it does not follow that other industrial activities do not have such a close and intimate relation to interstate commerce as to make the presence of industrial strife a matter of the most urgent national concern. When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war? We have often said that interstate commerce itself is a practical conception. It is equally true that interferences with that commerce must be appraised by a judgment that does not ignore actual experience.

"Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace. Refusal to confer and negotiate has been one of the most prolific causes of strife. This is such an outstanding fact in the history of labor disturbances that it is a proper subject of judicial notice and requires no citation of instances. The opinion in the case of Virginian Railway Co. v. System Federation, No. 40, supra, points out that, in the case of carriers, experience has shown that before the amendment, of 1934, of the Railway Labor Act 'when there was no dispute as to the organizations authorized to represent the employees and when there was a willingness of the employer to meet such representative for a discussion of their grievances, amicable adjustment of differences had generally followed and strikes had be avoided.' That, on the other hand, 'a prolific source of dispute had been the maintenance by the railroad of company unions and the denial by railway management of the authority of representatives chosen by their employees.' The opinion in that case also points to the large measure of success of the labor policy embodied in the Railway Labor Act. But with respect to the appropriateness of the recognition of self-organization and representation in the promotion of peace, the question is not

essentially different in the case of employees in industries of such a character that interstate commerce is put in jeopardy from the case of employees of transportation companies. And of what avail is it to protect the facility of transportation if interstate commerce is throttled with respect to the commodities to be transported!

"These questions have frequently engaged the attention of Congress and have been the subject of many inquiries. The steel industry is one of the great basic industries of the United States, with ramifying activities affecting interstate commerce at every point. The Government aptly refers to the steel strike of 1919–1920 with its far-reaching consequences. The fact that there appears to have been no major disturbance in that industry in the more recent period did not dispose of the possibilities of future and like dangers to interstate commerce which Congress was entitled to foresee and to exercise its protective power to forestall. It is not necessary again to detail the facts as to respondent's enterprise. Instead of being beyond the pale, we think that it presents in a most striking way the close and intimate relation which a manufacturing industry may have to interstate commerce and we have no doubt that Congress had constitutional authority to safeguard the right of respondent's employees to self-organization and freedom in the choice of representatives for collective bargaining."

Upon the basis of this opinion, the Supreme Court held that the Act had likewise been validly applied by the Board in the Fruehauf and Friedman-Harry Marks cases. For the opinions of the Supreme Court in all three of these cases, see U. S. Law Week, April 13, 1937, Index pages 966–975.

4. In addition to sustaining the validity and applicability of the Act in such cases as that involved herein, the Supreme Court in its said decision in National Labor Relations Board v. Jones & Laughlin Steel Corporation fully upheld the adequacy and exclusiveness of the remedies afforded in the statutory procedure of the Act for the review of all questions of constitutional right or statutory authority, including the question of jurisdiction of the Board and the regularity of its proceedings in any particular case. In dealing with this express subject, the opinion of the Court in the said Jones & Laughlin case states as follows:

"The procedural provisions of the Act are assailed. But these provisions, as we construe them, do not offend against the constitutional requirements governing the creation and action of administrative bodies. See Interstate Commerce Commission v. Louisville & Nashville R. Co., 227 U. S. 88, 91. The Act establishes standards to which the Board must conform. There must be complaint, notice, and hearings. The Board must receive evidence and make findings. The findings as to the facts are to be conclusive, but only if supported by evidence. The order of the Board is subject to review by the designated court, and only when sustained by the court may the order be enforced. Upon that review all questions of the jurisdiction of the Board and the regularity of its proceedings,

all questions of constitutional right or statutory authority are open to examination by the court. We construe the procedural provisions as affording adequate opportunity to secure judicial protection against arbitrary action in accordance with the well-settled rules applicable to administrative agencies set up by Congress to aid in the enforcement of valid legislation. It is not necessary to repeat these rules which have frequently been declared. None of them appears to have been transgressed in the instant case. Respondent was notified and heard. It had opportunity to meet the charge of unfair labor practices upon the merits, and by withdrawing from the hearing it declined to avail itself of that opportunity. The facts found by the Board support its order and the evidence supports the findings. Respondent has no just ground for complaint on this score."

This flat declaration of the adequacy of the remedies provided by the Act no doubt explains why the United States Supreme Court has denied certiorari in every case presented to it in which the Circuit Courts of Appeals have held that there is no jurisdiction in equity to restrain proceedings instituted, like the one herein involved, pursuant to the Act. On April 5, 1937, the Supreme Court denied certiorari in such a case entitled Marathon Electric Manufacturing Corporation v. Clark et al. (No. 752), in which case, and in five others decided simultaneously, the Seventh Circuit had reversed injunction decrees restraining proceedings under the Act, and had directed that the respective bills of complaint be dismissed (See U. S. Law Week, April 6, 1937, p. 7). On March 15, 1937, the United States Supreme Court denied certiorari in eight similar cases, one involving the Bethlehem Shipbuilding Corp., appellee herein, in which the United States Court of Appeals for the District of Columbia had held that equitable jurisdiction to restrain proceedings under the Act did not exist and had affirmed decrees dismissing the respective bills of complaint (Nos. 704, 705, 706, 707, 708, 709, 710, 744; U. S. Law Week, March 16, 1937, p. 8). On October 12, 1936, the Supreme Court denied certiorari in a similar case decided by the Fifth Circuit Court of Appeals, entitled Bradley Lumber Company v. National Labor Relations Board, 57 Sup. Ct. 21.

5. The decisions of the United States Supreme Court referred to in paragraphs 3 and 4 hereof, and the additional decisions of that Court under the Act rendered the same day (The Associated Press v. National Labor Relations Board, No. 365; Washington, Virginia, and Maryland Coach Company, No. 469), are in direct conflict with the grounds of this Court's said decision herein as set forth in paragraph 2 hereof, and said intervening decisions of the Supreme Court, are fully determinative of the issues in these causes. In such circumstances, justice requires that this petition for rehearing be granted and that the decrees entered below by the District Court be reversed. Burget v. Robinson (C. C. A. 1st), 123 Fed. 262; United States v. Harris (C. C. A. 8th), 286 Fed. 910; Unitype Co. v. Long

(C. C. A. 6th), 149 Fed. 196; Omaha Elec. Light & Power Co. v. City of Omaha (C. C. A. 8th), 216 Fed. 848.

6. On April 13, 1937, this Court stayed the mandate herein upon condition that appellants duly file their petition for certiorari in these causes in the United States Supreme Court on or before May 1, 1937. In view of the said decisions of the United States Supreme Court referred to in paragraphs 3 and 4 hereof, appellants will be put to unnecessary delay and expense if required to proceed with said petitions for certiorari, a valid statute of the United States, now in all respects upheld by the Supreme Court of the United States, will be seriously interfered with in this Circuit, by judicial action inconsistent with the decisions of the Supreme Court of the United States, and the Supreme Court itself unnecessarily imposed upon through the necessity of reviewing the case on certiorari.

Appellants also pray that they be permitted to withhold proceeding with said petitions for certiorari pending the determination of this Court upon this petition for rehearing.

Respectfully,

CHARLES FAHY,
ROBERT B. WATTS,
Attorneys for Appellants.

APRIL 19, 1937.

Certificate of counsel

Comes now Robert B. Watts, one of the attorneys for defendants-appellants, and certifies that he has read and knows the contents of the foregoing petition, and that said petition is well founded and that it is filed in good faith and not for the purpose of delay.

ROBERT B. WATTS.

Thereafter, to wit, on May 13, 1937, the following opinion of the court was filed:

Before BINGHAM, WILSON, AND MORTON, JJ.

Opinion of the court on motion for leave to file a petition for rehearing

May 13, 1937

PER CURIAM: The appellants have moved for leave to file a petition for rehearing and urge that our decision in these cases is in conflict with that of the Supreme Court in National Labor Relations Board v. Jones & Laughlin Steel Corporation (decided 12 April 1937), and allied cases. In the opinion in the Jones & Laughlin case it is said: "The various parts of respondent's enterprise are described as interdependent and as thus involving a great movement of iron ore, coal, and limestone, along well-defined paths to the steel mills, thence through them, and thence in the form of steel products into the consuming centers of the country,—a definite and well-

understood course of business." * * * "Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot de denied the power to exercise that control." * * * "The question is necessarily one of degree." * * * "It is thus apparent that the fact that the employees here concerned were engaged in production is not determinative. The question remains as to the effect upon interstate commerce of the labor practice involved." * * * "In view of respondent's far-flung activities, it is idle to say that the effect would be indirect or remote." Hughes, C. J., National Labor Relations Board, Petitioner, v. Jones & Laughlin Steel Corporation.

In the present case the District Judge found that "The plaintiff is a Delaware corporation, owning and operating a shipbuilding plant at Quincy, Massachusetts, known as the Fore River Plant. This plant and its equipment is fully described in the bill. The plaintiff is engaged in the business of designing and building vessels of various kinds under specific contracts and employs approximately 5,000 employees. It fabricates substantially all materials used in the building of vessels, and for the most part builds boilers and main propelling machinery for each vessel. The vessels are delivered at the Fore River Plant. The cost of materials represents less than one half the entire cost of the vessel."

It is obvious that the business here in question as described in the finding of the District Judge is very different in character from the "far-flung" enterprises of the Jones & Laughlin Steel Corporation, or from the essentially interstate businesses involved in National Labor Relations Board v. Friedman-Harry Marks Clothing Co. and National Labor Relations Co. v. Fruehauf Trailer Co. In applying the test laid down in the Jones & Laughlin opinion to individual business organizations some uncertainty as to which are under federal control in their relations with their employees and which under state control will at first be unavoidable. When the question is raised, as in this case, we think it devolves on the National Labor Relations Board to show that the business involved is probably within its jurisdiction. On the findings of the District Judge that fact is not established in the present case. We think the case should stand for final hearing in the District Court.

Motion denied.

On the same day the following Order of Court was entered:

Order of court

May 13, 1937

The motion for leave to file a petition for rehearing is hereby denied.

By the Court:

ARTHUR I. CHARRON, *Clerk.*

Clerk's certificate

I, Arthur I. Charron, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify that the foregoing pages numbered 1 to 265, inclusive, contain and are a true copy of the record, and all proceedings to and including June 8, 1937, in the causes in said court numbered and entitled No. 3189, A. Howard Myers et al., Individually and as the National Labor Relations Board, defendants, appellants, v. Bethlehem Shipbuilding Corporation, Ltd., plaintiff, appel'ee; No. 3190, A. Howard Myers et al., Individually and as the National Labor Relations Board, defendants, appellants, v. Charles MacKenzie et al., plaintiffs, appellees.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit, this eighth day of June, A. D. 1937.

[SEAL] ARTHUR I. CHARRON, *Clerk.*

U. S. GOVERNMENT PRINTING OFFICE: 1937

245 Supreme Court of the United States

No. 181.— October Term, 1937

Order allowing certiorari

Filed October 11, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Black took no part in the consideration and decision of this application.

246 Supreme Court of the United States

No. 182 — October Term, 1937

Order allowing certiorari

Filed October 11, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Black took no part in the consideration and decision of this application.

U. S. GOVERNMENT PRINTING OFFICE: 1937

NATIONAL LABOR RELATIONS BOARD

RULES AND REGULATIONS

SERIES 1, AS AMENDED

AND

NATIONAL LABOR RELATIONS ACT

(48 STAT. 449)

APRIL 27, 1936

UNITED STATES
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NATIONAL LABOR RELATIONS BOARD

J. WARREN MADDEN, *Chairman*
JOHN M. CARMODY
EDWIN S. SMITH

BENEDICT WOLF, *Secretary*
CHARLES FAHY, *General Counsel*

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NATIONAL LABOR RELATIONS BOARD

Washington, D. C.

RULES AND REGULATIONS

SERIES 1, AS AMENDED

GENERAL RULES AND REGULATIONS

By virtue of the authority vested in it by the National Labor Relations Act, approved July 5, 1935, the National Labor Relations Board hereby issues the following Rules and Regulations—Series 1—as amended (General Rules and Regulations), which it finds necessary to carry out the provisions of said Act. Said Rules and Regulations—Series 1—as amended shall become effective upon the signing of the original by the members of the Board and upon the publication thereof in the Federal Register, and shall supersede the Rules and Regulations—Series 1—as amended (General Rules and Regulations) signed by the Board on April 15, 1935, which are hereby rescinded. The Rules and Regulations—Series 1—as amended (General Rules and Regulations) shall be in force and effect until amended or rescinded by rules and regulations hereafter made and published by the Board.

Signed at Washington, D. C., this 27th day of April 1936.

J. WARREN MADDEN, *Chairman.*
JOHN M. CARMODY, *Member.*
EDWIN S. SMITH, *Member.*

ARTICLE I

DEFINITIONS

SECTION 1. The terms "person", "employer", "employee", "representatives", "labor organization", "commerce", "affecting commerce", and "unfair labor practice", as used herein, shall have the meanings set forth in Section 2 of the National Labor Relations Act, a copy of which Act is appended hereto.

SEC. 2. The term "Act" as used herein shall mean the National Labor Relations Act, and the term "Board" shall mean the National Labor Relations Board.

SEC. 3. The term "Region" as used herein shall mean that part of the United States or any Territory thereof fixed by the Board as a particular Region.

SEC. 4. The term "Regional Director" as used herein shall mean the agent designated by the Board as Regional Director for a particular Region.

SEC. 5. The term "Trial Examiner" as used herein shall mean the Board, its member, agent or agency conducting the hearing.

SEC. 6. The term "State" as used herein shall include all States, Territories, and possessions of the United States and the District of Columbia.

ARTICLE II

PROCEDURE UNDER SECTION 10 OF THE ACT FOR THE PREVENTION OF UNFAIR LABOR PRACTICES

CHARGE

SECTION 1. A charge that any person has engaged in or is engaging in any unfair labor practice affecting commerce may be made by any person or labor organization. A charge may be withdrawn only with the consent of the Regional Director with whom such charge was filed or of the Board. Upon withdrawal of any charge, the Regional Director shall dismiss any complaint based thereon.

SEC. 2. Except as provided in Section 37 of this Article, such charge shall be filed with the Regional Director for the Region in which the alleged unfair labor practice has occurred or is occurring. A charge alleging that an unfair labor practice has occurred or is occurring in two or more Regions may be filed with the Regional Director for any of such Regions.

SEC. 3. Such charge shall be in writing, the original being signed and sworn to before any notary public or any agent of the Board authorized to administer oaths or acknowledgments. Three additional copies of such charge shall be filed. A blank form for making a charge will be supplied by the Regional Director upon request.

SEC. 4. Such charge shall contain the following:

(*a*) The full name and address of the person or labor organization making the charge.

(*b*) The full name and address of the person against whom the charge is made (hereinafter referred to as the "respondent").

(*c*) A clear and concise statement of the facts constituting the alleged unfair labor practice affecting commerce, particularly stating the names of the individuals involved and the time and place of occurrence.

COMPLAINT

SEC. 5. After a charge has been filed, if it appears to the Regional Director that a proceeding in respect thereto should be instituted, he shall issue and cause to be served upon the respondent and the person or labor organization making the charge (hereinafter referred to as the "parties to the proceeding") a formal complaint in the name of the Board stating the charges and containing a notice of hearing before a Trial Examiner at a place therein fixed and at a time not less than five days after the service of the complaint. A copy of the charge shall be attached to the complaint.

SEC. 6. Upon his own motion or upon proper cause shown by any of the parties to the proceeding the Regional Director issuing the complaint may extend the date of such hearing.

SEC. 7. Any such complaint may be amended by the Trial Examiner or the Board in his or its discretion at any time prior to the issuance of an order based thereon, upon such terms as may be deemed just.

SEC. 8. Any such complaint may be withdrawn before the hearing by the Regional Director on his own motion.

SEC. 9. If, after the charge has been filed, the Regional Director declines to issue and cause to be served a complaint, the person or labor organization making the charge may obtain a review of such action by filing a request therefor with the Board in Washington, D. C., and filing a copy of such request with the Regional Director.

ANSWER

SEC. 10. The respondent shall have the right, within five days from the service of the complaint, to file an answer thereto. Such answer shall contain a short and simple statement of the facts which constitute the grounds of defense. Respondent shall specifically admit or deny or explain each of the facts alleged in the complaint, unless respondent is without knowledge, in which case respondent shall so state, such statement operating as a denial. Any allegation in the complaint not specifically denied in the answer, unless respondent shall state in the answer that respondent is without knowledge, shall be deemed to be admitted to be true and may be so found by the Board.

SEC. 11. Such answer shall be filed with the Regional Director issuing the complaint. Such answer shall be in writing, the original being signed and sworn to by the respondent or by a duly authorized agent with appropriate power of attorney affixed, and shall contain the post-office address of the respondent. The respondent shall file three additional copies of the answer for the use of the Board. Im-

mediately upon filing his answer the respondent shall serve a copy thereof upon each of the other parties to the proceeding.

SEC. 12. Upon his own motion or upon proper cause shown by respondent the Regional Director issuing the complaint may by written order extend the time within which the answer shall be filed.

SEC. 13. In any case where a complaint has been amended the respondent shall have an opportunity to amend his answer within such period as may be fixed by the Trial Examiner, if he amends the complaint, or by the Board, if it amends the complaint.

MOTIONS

SEC. 14. All motions made previous to or subsequent to the hearing shall be filed in writing with the Regional Director issuing the complaint, and shall briefly state the order or relief applied for and the grounds for such motion. The moving party shall file an original and three additional copies of all such motions for the use of the Board. Immediately upon the filing of such motion, the moving party shall serve a copy thereof upon each of the other parties to the proceeding. All motions made at the hearing (except motions to intervene, as provided in Section 19 of this Article) shall be stated orally and included in the stenographic report of the hearing.

SEC. 15. The Trial Examiner designated to conduct the hearing shall rule upon all motions (except as provided in Sections 6, 12, and 19 of this Article). The Trial Examiner may, before the hearing, rule on motions filed previous to the hearing, and shall file his ruling, and any order in connection therewith, with the Regional Director issuing the complaint. The Regional Director shall cause copies thereof to be served upon the parties to the proceeding. Rulings on motions, and any orders in connection therewith, if announced at the hearing, shall be stated orally and included in the stenographic report of the hearing; in all other cases they shall be issued in writing and filed with the Regional Director, who shall cause a copy of the same to be served upon each of the parties to the proceeding, or shall be contained in the Intermediate Report. Whenever the Trial Examiner has reserved his ruling on any motion, and the proceeding is thereafter transferred to and continued before the Board pursuant to Section 37 of this Article, the Board shall rule on such motion.

SEC. 16. All motions, rulings, and orders shall become part of the record in the proceeding, and rulings and orders claimed to be substantially prejudicial shall be reviewed by the Board, upon request made for such review, in conjunction with the Board's consideration of the Intermediate Report.

SEC. 17. If any motion in the nature of a motion to dismiss the complaint is granted by the Trial Examiner, the party making the charge may obtain a review of such action by filing a request therefor with the Board in Washington, D. C., stating the grounds for review, and filing a copy of such request with the Regional Director and the other parties to the proceeding. Unless such request for review is filed within ten days from the date of the order of dismissal, the case shall be considered closed. The Board may, upon motion made within a reasonable period and for good cause shown, reopen the record for further proceedings.

SEC. 18. The right to make motions or to make objection to rulings upon motions shall not be deemed waived by the filing of an answer or by other participation in the proceedings before the Trial Examiner or the Board.

INTERVENTION

SEC. 19. Any person or labor organization desiring to intervene in any proceeding shall file a motion in writing with the Regional Director issuing the complaint setting out the grounds upon which such person or organization claims to be interested. The original of such motion shall be signed and sworn to by the person or labor organization filing the motion, who shall file three additional copies of such motion for the use of the Board. Immediately upon filing such motion, the moving party shall serve a copy thereof upon each of the other parties to the proceeding. The Regional Director shall rule upon all such motions filed prior to the hearing, and the Trial Examiner shall rule upon all such motions filed at the hearing, in the manner set forth in Section 15 of this Article. The Regional Director of the Trial Examiner, as the case may be, may by order permit intervention in person or by counsel to such extent and upon such terms as he shall deem just. The Regional Director shall cause a copy of said ruling to be served upon each of the parties to the proceeding.

WITNESSES AND SUBPENAS

SEC. 20. Witnesses shall be examined orally under oath, except that for good and exceptional cause the Trial Examiner may permit their testimony to be taken by deposition under oath. Any such deposition shall be taken in accordance with the procedural requirements for the taking of depositions provided by the law of the State in which the hearing is pending.

SEC. 21. Any member of the Board may issue subpenas requiring the attendance and testimony of witnesses and the production of any evidence, including books, records, correspondence, or docu-

ments that relate to any matter under investigation or in question, before the Board, its member, agent, or agency, conducting the hearing or investigation. Applications for the issuance of such subpenas may be filed by any party to the proceedings with the Regional Director, or, during the hearing, with the Trial Examiner. Such applications shall be timely and shall specify the name of the witness and the nature of the facts to be proved by him, and must specify the documents, the production of which is desired, with such particularity as will enable them to be identified for purposes of production.

SEC. 22. Witnesses summoned before the Trial Examiner shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States. Witness fees and mileage shall be paid by the party at whose instance the witnesses appear and the person taking the deposition shall be paid by the party at whose instance the deposition is taken.

HEARING

SEC. 23. The hearing for the purpose of taking evidence upon a complaint shall be conducted by a Trial Examiner specifically designated by the Board, by the Chief Trial Examiner, or by the Regional Director. At any time a Trial Examiner may be designated to take the place of the Trial Examiner previously designated to conduct the hearing. Such hearings shall be public, unless otherwise ordered by the Trial Examiner.

SEC. 24. It shall be the duty of the Trial Examiner to inquire fully into the facts as to whether the respondent has engaged in or is engaging in an unfair labor practice affecting commerce as set forth in the complaint or amended complaint. Counsel for the Board, and the Trial Examiner, shall have power to call, examine, and cross-examine witnesses and to introduce into the record documentary or other evidence.

SEC. 25. Any party to the proceeding shall have the right to appear at such hearing in person, by counsel, or otherwise, to call, examine, and cross-examine witnesses, and to introduce into the record documentary or other evidence.

SEC. 26. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

SEC. 27. In any such proceeding stipulations of fact may be introduced in evidence with respect to any issue.

SEC. 28. Any objection with respect to the conduct of the hearing, including any objection to the introduction of evidence, shall be

stated orally, together with a short statement of the grounds of such objection, and included in the stenographic report of the hearing. No such objection shall be deemed waived by further participation in the proceeding.

SEC. 29. Any party to the proceeding shall be entitled to a reasonable period at the close of the hearing for oral argument, which shall not be included in the stenographic report of the hearing unless the Trial Examiner so directs. The parties shall be entitled to file briefs or written statements only with permission of the Trial Examiner.

SEC. 30. In the discretion of the Trial Examiner, the hearing may be continued from day to day, or adjourned to a later date or to a different place, by announcement thereof at the hearing by the Trial Examiner, or by other appropriate notice.

SEC. 31. Contemptuous conduct at any hearing before a Trial Examiner or before the Board shall be ground for exclusion from the hearing. The refusal of a witness at any such hearing to answer any question which has been ruled to be proper shall be ground for the striking out of all testimony previously given by such witness on related matters.

INTERMEDIATE REPORT AND TRANSMISSION OF CASE TO THE BOARD

SEC. 32. After a hearing for the purpose of taking evidence upon a complaint, the Trial Examiner shall prepare an Intermediate Report, which he shall file with the Regional Director issuing the complaint, who will thereafter transmit the original of the Intermediate Report to the Board in Washington, D. C., and cause a copy thereof to be served upon each of the parties to the proceeding. Such report shall contain (*a*) findings of fact, separately stated and numbered, and (*b*) recommendations as to what disposition of the case should be made, which may include, if it be found that respondent has engaged in or is engaging in the alleged unfair labor practice, a recommendation as to what affirmative action should be taken by respondent to bring about a condition in harmony with the law.

SEC. 33. Thereafter the Regional Director issuing the complaint shall forward to the Board in Washington, D. C., the charge, complaint, amended complaint, notice of hearing, answer, amended answer, motions, rulings, orders, the stenographic report of the hearing, stipulations, exhibits, documentary evidence, and depositions, all of which, together with the Intermediate Report and exceptions, shall constitute the record in the case.

EXCEPTIONS TO THE RECORD AND INTERMEDIATE REPORT

SEC. 34. If any party desires to take an exception to the Intermediate Report or to any other part of the record (including

rulings upon all motions or objections) he shall within ten days from the date of service of the Intermediate Report file with the Board at Washington, D. C., four copies of a statement in writing setting forth such exceptions. Immediately upon the filing of the statement of exceptions the party filing the same shall serve a copy thereof upon each of the other parties to the proceeding. Upon proper cause shown, the Board may extend the period within which to file a statement of exceptions.

SEC. 35. No matter not included in a statement of exceptions may thereafter be objected to before the Board, and failure to file a statement of exceptions shall operate as submission of the case to the Board on the record and the Intermediate Report.

PROCEDURE BEFORE THE BOARD

SEC. 36. Where the Trial Examiner has found in his Intermediate Report that the respondent has engaged in or is engaging in unfair labor practices affecting commerce, the Board may, upon the expiration of the period for filing a statement of exceptions, as provided in Section 34 of this Article, decide the matter forthwith upon the record, or after the filing of briefs, or oral argument, or may reopen the record and receive further evidence, or require the taking of further evidence before a member of the Board or other agent or agency, or may make other disposition of the case. The Board shall notify the parties of the time and place for any such submission of briefs, oral argument, or taking of further evidence.

Where the Trial Examiner has found in his Intermediate Report that the respondent has not engaged in and is not engaging in unfair labor practices affecting commerce, and no exceptions have been filed within the period for filing a statement of exceptions, as provided in Section 34 of this Article, the case shall be considered closed. The Board may, upon motion made within a reasonable period and upon proper cause shown, reopen the record for further proceedings in accordance with this Section.

SEC. 37. Whenever the Board deems it necessary in order to effectuate the purposes of the Act, it may permit a charge to be filed with it, in Washington, D. C., or may, at any time after a charge has been filed with a Regional Director pursuant to Section 2 of this Article, order that such charge, and any proceeding which may have been instituted in respect thereto—

(*a*) be transferred to and continued before it, for the purpose of consolidation with any proceeding which may have been instituted by the Board, or for any other purpose; or

(*b*) be consolidated for the purpose of hearing, or for any other purpose, with any other proceeding which may have been instituted in the same region; or

(*c*) be transferred to and continued in any other Region, for the purpose of consolidation with any proceeding which may have been instituted in or transferred to such other Region, or for any other purpose.

The provisions of Sections 3 to 31, inclusive, of this Article shall, in so far as applicable, apply to proceedings before the Board pursuant to this Section, and the powers granted to Regional Directors in such provisions shall, for the purpose of this Section, be reserved to and exercised by the Board. After the transfer of any charge and any proceeding which may have been instituted in respect thereto from one Region to another pursuant to this Section, the provisions of Sections 3 to 36, inclusive, of this Article, shall apply to such charge and such proceeding as if the charge had originally been filed in the Region to which the transfer is made.

SEC. 38. After a hearing for the purpose of taking evidence upon the complaint in any proceeding over which the Board has assumed jurisdiction in accordance with Section 37 of this Article, the Board may—

(*a*) direct that the Trial Examiner prepare an Intermediate Report, in which case the provisions of Sections 32 to 36, inclusive, of this Article shall in so far as applicable govern subsequent procedure, and the powers granted to Regional Directors in such provisions shall for the purpose of this Section be reserved to and exercised by the Board; or

(*b*) decide the matter forthwith upon the record, or after the filing of briefs or oral argument; or

(*c*) reopen the record and receive further evidence, or require the taking of further evidence before a member of the Board, or other agent or agency; or

(*d*) make other disposition of the case.

The Board shall notify the parties of the time and place of any such submission of briefs, oral argument, or taking of further evidence.

ARTICLE III

PROCEDURE UNDER SECTION 9 (c) OF THE ACT FOR THE INVESTIGATION AND CERTIFICATION OF REPRESENTATIVES

SECTION 1. A petition requesting the Board to investigate and certify under Section 9 (c) of the Act the name or names of the representatives designated or selected for the purpose of collective bargaining may be filed by any employee or any person or labor organization acting on his behalf (hereinafter referred to as the "petitioner"). Except as provided in Section 10 of this Article, such

petition shall be filed with the Regional Director for the Region wherein the contemplated bargaining unit exists, or, if the contemplated bargaining unit exists in two or more Regions, with the Regional Director for any of such Regions. Such petition shall be in writing, the original being signed and sworn to before any notary public or any agent of the Board authorized to administer oaths or acknowledgments. Three additional copies of the petition shall be filed. A blank form for filing such a petition will be supplied by the Regional Director upon request.

SEC. 2. Such petition shall contain the following:

(*a*) The name and address of the petitioner.

(*b*) The name and address of the employer or employers involved, the general nature of their businesses, and the approximate number of their employees.

(*c*) A description of the bargaining unit claimed to be appropriate, the approximate number of employees therein, the number and classifications of employees which the representatives on whose behalf the petition is filed claim to represent, the names of any other known individuals or labor organizations who claim to represent any of the employees in the alleged bargaining unit.

(*d*) A brief statement setting forth the nature of the question or controversy affecting commerce that has arisen concerning representation.

(*e*) Any other relevant facts.

SEC. 3. If it appears to the Board that an investigation should be instituted it shall so direct and (except as provided in Section 10 of this Article) shall authorize the Regional Director to undertake such investigation, and to provide for an appropriate hearing upon due notice, either in conjunction with a proceeding instituted pursuant to Section 5 of Article II of these Rules and Regulations, or otherwise. The Regional Director shall thereupon proceed with such investigation and in connection therewith shall prepare and cause to be served upon the petitioners, upon the employer or employers involved, and upon any known individuals or labor organizations purporting to act as representatives of any employees directly affected by such investigation (all of whom are hereinafter referred to as "the parties to the proceeding"), a notice of hearing upon the question of representation before a Trial Examiner at a time and place fixed therein. A copy of the petition shall be served with such notice of hearing.

SEC. 4. All matters relating to motions, interventions, witnesses, and subpenas shall be governed by the provisions of sections 14 to 22, inclusive, of Article II of these Rules and Regulations.

SEC. 5. The hearing upon the question of representation shall be conducted by a Trial Examiner specially designated by the Board, by the Chief Trial Examiner, or by the Regional Director, and shall be open to the public unless otherwise ordered by the Trial Examiner. At any time a Trial Examiner may be designated to take the place of the Trial Examiner previously designated to conduct the hearing. It shall be the duty of the Trial Examiner to inquire fully into the question of representation. Counsel for the Board, and the Trial Examiner, shall have power to call, examine, and cross-examine witnesses and to introduce into the record documentary and other evidence.

SEC. 6. The introduction of evidence at the hearing and the rights of the parties to the proceedings shall be governed by Sections 25 to 31, inclusive, of Article II of these Rules and Regulations.

SEC. 7. Upon the close of the hearing the Regional Director shall forward to the Board in Washington, D. C., the petition, notice of hearing, motions, rulings, orders, the stenographic report of the hearing, stipulations, exhibits, documentary evidence, and depositions, all of which shall constitute the record in the proceeding.

SEC. 8. The Board shall thereupon proceed, either forthwith upon the record, or after oral argument or the submission of briefs, or after further hearing, as it may determine, to certify to the parties to the proceeding the name or names of the representatives that have been designated or selected, or to direct a secret ballot of the employees in order to complete the investigation, or to make other disposition of the matter.

SEC. 9. Where the Board determines that a secret ballot should be taken it shall direct such ballot to be conducted by a designated agent upon such terms as it may specify. Upon conclusion of such ballot the agent conducting the ballot shall prepare an Intermediate Report containing a tally of the ballots, his findings and recommendations, which he shall cause to be served upon the parties to the proceeding. Within five days thereafter the parties to the proceeding may file with the Regional Director any objection to the ballot or the Intermediate Report. If it appears to the Regional Director that any such objection raises a substantial and material issue with respect to the conduct of the ballot he shall issue and cause to be served upon the parties a notice of hearing on said objections before a Trial Examiner. Said Trial Examiner shall consider such objections raised to said ballot and shall prepare and file with the Regional Director a report containing findings and recommendations with respect thereto. Thereafter the Regional Director shall forward to the Board in Washington, D. C., the Intermediate Report of the agent conducting the ballot, the objections filed thereto, the notice of hearing, motions, rulings, orders, the steno-

graphic report of the hearing, stipulations, exhibits, documentary evidence, and depositions, all of which, together with the record previously made, shall constitute the record in the case. The Board shall thereupon proceed as set forth in Section 8 of this Article. If no objection raising a substantial and material issue with respect to the conduct of the ballot is filed to the Intermediate Report of the agent conducting the ballot the Regional Director shall forward directly to the Board in Washington, D. C., the Intermediate Report, which, together with the record previously made, shall constitute the record in the case. The Board shall thereupon proceed as set forth in Section 8 of this Article.

SEC. 10. Whenever the Board deems it necessary in order to effectuate the purposes of the Act, it may—

(*a*) permit a petition requesting an investigation and certification to be filed with it, and may upon the filing of such petition proceed to conduct an investigation under Section 9 (*c*) of the Act, or direct any Regional Director, or other agent or agency, to conduct such an investigation; or

(*b*) upon its own motion conduct, or direct any member, Regional Director, or other agent or agency to conduct an investigation under Section 9 (*c*) of the Act; or

(*c*) at any time after a petition has been filed with a Regional Director pursuant to Section 1 of this Article, order that such petition, and any proceeding which may have been instituted in respect thereto—

(1) be transferred to and continued before it, for the purpose of consolidation with any proceeding which may have been instituted by the Board, or for any other purpose; or

(2) be consolidated, for the purpose of hearing, or for any other purpose, with any other proceeding which may have been instituted in the same Region; or

(3) be transferred to and continued in any other Region, for the purpose of consolidation with any proceeding which may have been instituted in such other Region, or for any other purpose.

The provisions of this Article shall, insofar as applicable, apply to proceedings conducted pursuant to subsections (*a*), (*b*), and (*c*) (1) of this Section, and the powers granted to Regional Directors in such provisions shall for the purpose of this Section be reserved to and exercised by the Board, or by the Regional Director, or other agent or agency, directed to conduct the investigation. After the transfer of any petition and any proceeding which may have been instituted in respect thereto from one Region to another pursuant to subsection (*c*) (3) of this Section, the provisions of this Article shall apply to

such proceeding as if the Board had originally directed that the investigation be conducted in the Region to which the transfer is made.

ARTICLE IV

DESIGNATION OF REGIONAL DIRECTORS, EXAMINERS, AND ATTORNEYS AS AGENTS OF THE BOARD

SECTION 1. All Regional Directors now or hereafter in the employ of the Board are herewith designated by the Board as its agents:

(*a*) To prosecute any inquiry necessary to the functions of the Board, in accordance with Section 5 of the Act.

(*b*) To investigate concerning the representation of employees (including the taking of secret ballots of employees) and conduct hearings in connection with such investigations, in accordance with Section 9 (c) of the Act.

(*c*) To issue and cause to be served complaints, to amend complaints, and to conduct hearings upon such complaints, in accordance with Section 10 (b) of the Act.

(*d*) To have access to and the right to copy evidence, to administer oaths and affirmations, to examine witnesses, and to receive evidence, in accordance with Section 11 (1) of the Act.

SEC. 2. All Examiners now or hereafter in the employ of the Board are herewith designated by the Board as its agents:

(*a*) To prosecute any inquiry necessary to the functions of the Board, in accordance with Section 5 of the Act.

(*b*) To investigate concerning the representation of employees (including the taking of secret ballots of employees), in accordance with Section 9 (c) of the Act.

(*c*) To have access to and the right to copy evidence, and to administer oaths and affirmations, in accordance with Section 11 (1) of the Act.

SEC. 3. All Attorneys now or hereafter in the employ of the Board are herewith designated by the Board as its agents:

(*a*) To prosecute any inquiry necessary to the functions of the Board, in accordance with Section 5 of the Act.

(*b*) To investigate concerning the representation of employees (including the taking of secret ballots of employees) and conduct hearings in connection with such investigation, in accordance with Section 9 (c) of the Act.

(*c*) To amend complaints issued under Section 10 (b) of the Act and to conduct hearings upon complaints issued in accordance with Section 10 (b) of the Act.

(*d*) To have access to and the right to copy evidence, to administer oaths and affirmations, to examine witnesses, and to receive evidence, in accordance with Section 11 (1) of the Act.

SEC. 4. The foregoing designations shall not be construed to limit the power of the Board to make such special designation of agents as may in its discretion be necessary or proper to effectuate the purposes of the Act.

ARTICLE V

SERVICE OF PAPERS

SECTION 1. Complaints, orders, and other process and papers of the Board, its member, agent, or agency, may be served personally or by registered mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same, setting forth the manner of such service shall be proof of the same, and the return post-office receipt or telegraph receipt therefor when registered and mailed or telegraphed as aforesaid shall be proof of service of the same.

SEC. 2. Service of papers by a party on other parties shall be made by registered mail or in any manner provided for the service of papers in a civil action by the law of the State in which the hearing is pending. When service is made by registered mail, the return post-office receipt shall be proof of service. When service is made in any manner provided by such law, proof of service shall be made in accordance with such law.

ARTICLE VI

CERTIFICATION AND SIGNATURE OF DOCUMENTS

SECTION 1. The Secretary of the Board, or in the event of his absence or disability, the Assistant Secretary of the Board, shall certify copies of all papers and documents which are a part of any of the files or records of the Board as may be necessary or desirable from time to time.

SEC. 2. The Secretary of the Board, or in the event of his absence or disability, the Assistant Secretary of the Board, is hereby authorized to sign all orders of the Board, and sign and issue all complaints authorized to be issued by the Board.

ARTICLE VII

CONSTRUCTION OF RULES

SECTION 1. These rules and regulations shall be liberally construed to effectuate the purposes and provisions of the Act.

ARTICLE VIII

AMENDMENTS

SECTION 1. Any rule or regulation may be amended or rescinded by the Board at any time.

APPENDIX

NATIONAL LABOR RELATIONS ACT

(48 Stat. 449)

AN ACT

To diminish the causes of labor disputes burdening or obstructing interstate and foreign commerce, to create a National Labor Relations Board, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

FINDINGS AND POLICY

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences

as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

DEFINITIONS

SEC. 2. When used in this Act—

(1) The term "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

(4) The term "representatives" includes any individual or labor organization.

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and

any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(8) The term "unfair labor practice" means any unfair labor practice listed in section 8.

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

(10) The term "National Labor Relations Board" means the National Labor Relations Board created by section 3 of this Act.

(11) The term "old Board" means the National Labor Relations Board established by Executive Order Numbered 6763 of the President on June 29, 1934, pursuant to Public Resolution Numbered 44, approved June 19, 1934 (48 Stat. 1183), and reestablished and continued by Executive Order Numbered 7074 of the President of June 15, 1935, pursuant to Title I of the National Industrial Recovery Act (48 Stat. 195) as amended and continued by Senate Joint Resolution 133 [1] approved June 14, 1935.

NATIONAL LABOR RELATIONS BOARD

SEC. 3. (a) There is hereby created a board, to be known as the "National Labor Relations Board" (hereinafter referred to as the "Board"), which shall be composed of three members, who shall be appointed by the President, by and with the advice and consent of the Senate. One of the original members shall be appointed for a term of one year, one for a term of three years, and one for a term of five years, but their successors shall be appointed for terms of five years each, except that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

[1] So in original.

(b) A vacancy in the Board shall not impair the right of the remaining members to exercise all the powers of the Board, and two members of the Board shall, at all times, constitute a quorum. The Board shall have an official seal which shall be judicially noticed.

(c) The Board shall at the close of each fiscal year make a report in writing to Congress and to the President stating in detail the cases it has heard, the decisions it has rendered, the names, salaries, and duties of all employees and officers in the employ or under the supervision of the Board, and an account of all moneys it has disbursed.

SEC. 4. (a) Each member of the Board shall receive a salary of $10,000 a year, shall be eligible for reappointment, and shall not engage in any other business, vocation, or employment. The Board shall appoint, without regard for the provisions of the civil-service laws but subject to the Classification Act of 1923, as amended, an executive secretary, and such attorneys, examiners, and regional directors, and shall appoint such other employees with regard to existing laws applicable to the employment and compensation of officers and employees of the United States, as it may from time to time find necessary for the proper performance of its duties and as may be from time to time appropriated for by Congress. The Board may establish or utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may, at the direction of the Board, appear for and represent the Board in any case in court. Nothing in this Act shall be construed to authorize the Board to appoint individual for the purpose of conciliation or mediation (or for statistical work), where such service may be obtained from the Department of Labor.

(b) Upon the appointment of the three original members of the Board and the designation of its chairman, the old Board shall cease to exist. All employees of the old Board shall be transferred to and become employees of the Board with salaries under the Classification Act of 1923, as amended, without acquiring by such transfer a permanent or civil service status. All records, papers, and property of the old Board shall become records, papers, and property of the Board, and all unexpended funds and appropriations for the use and maintenance of the old Board shall become funds and appropriations available to be expended by the Board in the exercise of the powers, authority, and duties conferred on it by this Act.

(c) All of the expenses of the Board, including all necessary traveling and subsistence expenses outside the District of Columbia incurred by the members or employees of the Board under its orders, shall be allowed and paid on the presentation of itemized vouchers

therefor approved by the Board or by any individual it designates for that purpose.

SEC. 5. The principal office of the Board shall be in the District of Columbia, but it may meet and exercise any or all of its powers at any other place. The Board may, by one or more of its members or by such agents or agencies as it may designate, prosecute any inquiry necessary to its functions in any part of the United States. A member who participates in such an inquiry shall not be disqualified from subsequently participating in a decision of the Board in the same case.

SEC. 6. (a) The Board shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this Act. Such rules and regulations shall be effective upon publication in the manner which the Board shall prescribe.

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701–712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain [1] such representatives.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice

[1] So in original.

(listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

(c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred, or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shal file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review

of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes", approved March 23, 1932 (U. S. C., Supp. VII, title 29, secs. 101–115).

(i) Petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed.

INVESTIGATORY POWERS

SEC. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. Any member of the Board shall have power to issue subpenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter under inves-

tigation or in question, before the Board, its member, agent, or agency conducting the hearing or investigation. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

(2) In case of contumacy or refusal to obey a subpena issued to any person, any District Court of the United States or the United States courts of any Territory or possession, or the Supreme Court of the District of Columbia, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

(3) No person shall be excused from attending and testifying or from producing books, records, correspondence, documents, or other evidence in obedience to the subpena of the Board, on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

(4) Complaints, orders, and other process and papers of the Board, its member, agent, or agency, may be served either personally or by registered mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same setting forth the manner of such service shall be proof of the same, and the return post office receipt or telegraph receipt therefor when registered and mailed or telegraphed as aforesaid shall be proof of service of the same. Witnesses summoned before the Board, its member, agent, or agency, shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

(5) All process of any court to which application may be made under this Act may be served in the judicial district wherein the defendant or other person required to be served resides or may be found.

(6) The several departments and agencies of the Government, when directed by the President, shall furnish the Board, upon its request, all records, papers, and information in their posesssion relating to any matter before the Board.

SEC. 12. Any person who shall willfully resist, prevent, impede, or interfere with any member of the Board or any of its agents or agencies in the performance of duties pursuant to this Act shall be punished by a fine of not more than $5,000 or by imprisonment for not more than one year, or both.

LIMITATIONS

SEC. 13. Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike.

SEC. 14. Wherever the application of the provisions of section 7 (a) of the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, sec. 707 (a)), as amended from time to time, or of section 77 B, paragraphs (l) and (m) of the Act approved June 7, 1934, entitled "An Act to amend an Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States' approved July 1, 1898, and Acts amendatory thereof and supplementary thereto" (48 Stat. 922, pars. (l) and (m)), as amended from time to time, or of Public Resolution Numbered 44, approved June 19, 1934 (48 Stat. 1183), conflicts with the application of the provisions of this Act, this Act shall prevail: *Provided*, That in any situation where the provisions of this Act cannot be validly enforced, the provisions of such other Acts shall remain in full force and effect.

SEC. 15. If any provision of this Act, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

SEC. 16. This Act may be cited as the "National Labor Relations Act."

Approved, July 5, 1935.

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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. —

A. HOWARD MYERS, INDIVIDUALLY AND AS ACTING REGIONAL DIRECTOR FOR THE FIRST REGION, NATIONAL LABOR RELATIONS BOARD, AND AS THE NATIONAL LABOR RELATIONS BOARD; EDMUND J. BLAKE, INDIVIDUALLY AND AS REGIONAL ATTORNEY FOR THE FIRST REGION, NATIONAL LABOR RELATIONS BOARD, AND AS THE NATIONAL LABOR RELATIONS BOARD; AND DANIEL M. LYONS, INDIVIDUALLY AND AS TRIAL EXAMINER OF THE NATIONAL LABOR RELATIONS BOARD, DESIGNATED OR TO BE DESIGNATED BY THE NATIONAL LABOR RELATIONS BOARD, AND AS THE NATIONAL LABOR RELATIONS BOARD, PETITIONERS

v.

BETHLEHEM SHIPBUILDING CORPORATION, LTD.

No. —

A. HOWARD MYERS, EDMUND J. BLAKE, AND DANIEL M. LYONS, INDIVIDUALLY AND AS THE NATIONAL LABOR RELATIONS BOARD, PETITIONERS

v.

CHARLES MACKENZIE, INDIVIDUALLY AND AS CHAIRMAN, JAMES E. MANNING, INDIVIDUALLY AND AS

VICE-CHAIRMAN, THOMAS E. BARKER, INDIVIDUALLY AND AS SECRETARY OF THE REPRESENTATION OF EMPLOYEES IN THE FORE RIVER PLANT OF THE BETHLEHEM SHIPBUILDING CORPORATION, LTD.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of the officers of the National Labor Relations Board, prays that writs of certiorari issue to review the decrees of the United States Circuit Court of Appeals for the First Circuit entered in the above causes on February 12, 1937 (R. 232), affirming the decrees of the United States District Court for the District of Massachusetts (R. 112–116, 220–221), granting temporary injunctions against the conduct of a hearing and the taking of other proceedings pursuant to the National Labor Relations Act.

OPINIONS BELOW

The opinions of the District Court (R. 117, 222) are unreported, although the opinion of the District Court upon petitioners' motion to dismiss, not involved in this appeal, is reported in 15 F. Supp. 915. The original opinion of the Circuit Court of Appeals for the First Circuit (R. 229) is reported in 88 F. (2d) 154; the opinion denying leave to file a second petition for rehearing (R. 242) is not yet reported.

JURISDICTION

The decrees of the Circuit Court of Appeals were entered on February 12, 1937 (R. 232). A petition for rehearing (R. 232) was denied on April 5, 1937 (R. 236), and leave to file a second petition for rehearing (R. 236) was denied on May 13, 1937 (R. 243). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, notwithstanding the procedure and remedies provided in the National Labor Relations Act, the District Court possessed jurisdiction to grant equitable relief by injunction against the conduct of a hearing and other proceedings which had been or might be undertaken by the National Labor Relations Board pursuant to that Act.

STATUTE AND REGULATIONS INVOLVED

The National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, U. S. C., Sup. II, Title 29, Sec. 151 *et seq.*) appears in the record (pp. 17–27 of pamphlet following R. 214). The applicable rules and regulations made and published by the Board pursuant thereto appear in the record (pamphlet following R. 214).

STATEMENT

On April 13, 1936, the National Labor Relations Board, through its Regional Director, petitioner A.

Howard Myers, filed a complaint against the Bethlehem Shipbuilding Corporation, Ltd., and gave notice of a hearing pursuant to Section 10 (b) of the National Labor Relations Act (R. 31–35). The complaint alleged that the company, a Delaware corporation, had dominated and interfered with the formation and administration of a labor organization, known as the Plan of Representation of Employees, in its plant at Fore River, Massachusetts, and had contributed financial and other support to it; and had thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8, subsections (1) and (2), and Section 2, subsections (6) and (7) of the National Labor Relations Act. On April 27, 1936, the respondent, Bethlehem Shipbuilding Corporation, Ltd., filed a bill of complaint in the District Court for the District of Massachusetts against the Board's Regional Director, Regional Attorney, and Trial Examiner, praying for a temporary and permanent injunction against the holding of the scheduled hearing or the taking of further proceedings under the Act, and also praying for a declaratory judgment. The bill alleged that the Act was unconstitutional in various respects, and that the holding of the hearing and the taking of further proceedings would cause the company irreparable damage by putting it to inconvenience and expense, injuring its good will, requiring the production of witnesses and business records, and disturbing harmonious relations with its employees. (R. 1–30.) On May

4, 1936, certain employees at the Fore River plant, individually and as officers of the Plan of Employee Representation involved, filed a bill (R. 146) and on May 7, filed a substituted bill (R. 151–166), praying for similar relief and on substantially the same grounds.

The petitioners A. Howard Myers and Edmund J. Blake who alone were personally served within the District of Massachusetts (R. 58, 147–148), moved to dismiss the bills (R. 60–65, 192–197), filed returns to the rules to show cause why temporary injunctions should not issue (R. 66–80, 197–213), and also moved to quash the subpoenas in so far as the individual petitioners were designated therein "as the National Labor Relations Board" (R. 81–82, 191–192). On May 28, 1936, the District Court entered interlocutory injunctions against the conduct of hearings and the taking of further proceedings until final hearing or until the injunctions were dissolved by order of the court if the motions to dismiss were subsequently granted (R. 112–116, 220–221). The District Court found that all the facts alleged in the bills of complaint were true, that certain subpoenas had been issued, and that it did not appear that any damage, inconvenience, or loss of rights would be suffered by any person if the hearing were postponed pending the decision on the motions to dismiss (R. 111, 219). It concluded as a matter of law that there was grave doubt whether the Act was not wholly unconstitutional and void, that the

plaintiffs would suffer irreparable damage of the kinds alleged in the bills of complaint if the hearing were held or if further proceedings were taken, and that the court was not then able to conclude that the plaintiffs had a plain, adequate, and complete remedy at law (R. 112, 219). Thereafter, on July 22, 1936, the District Court overruled the motions to dismiss (R. 118–135).

On appeal by the petitioners to the Circuit Court of Appeals for the First Circuit from the temporary injunction orders of the District Court, these orders were affirmed on February 12, 1937 (R. 229–232). On April 5, 1937, the court denied a petition for rehearing (R. 236), and on May 13, 1937, denied (R. 243) petitioners' motion for leave to file a second petition for rehearing (R. 236), based upon the supervening decisions of this Court on April 12, 1937. (*Associated Press* v. *National Labor Relations Board,* No. 365; *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* No. 419; *National Labor Relations Board* v. *Fruehauf Trailer Co.,* No. 420; *National Labor Relations Board* v. *Friedman-Harry Marks Clothing Co.,* No. 422; *Washington, Virginia and Maryland Coach Co.* v. *National Labor Relations Board,* No. 469.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the District Court had jurisdiction to grant an injunction against the conduct

of a hearing and the taking of other proceedings under the National Labor Relations Act;

2. In holding that the respondents would suffer irreparable injury cognizable in equity from the conduct of a hearing and the taking of further proceedings under the terms of the National Labor Relations Act;

3. In failing to hold that exclusive jurisdiction to review the action of the National Labor Relations Board, including all questions of the jurisdiction of the Board and the regularity of its proceedings, is vested in the appropriate United States Circuit Court of Appeals, upon the administrative record, findings, and order, in accordance with the terms of the National Labor Relations Act;

4. In failing to hold that the damage relied upon in the bills of complaint is not irreparable damage cognizable in equity;

5. In failing to hold that the respondents had a plain and adequate remedy under the terms of the National Labor Relations Act;

6. In failing to hold that the District Court had no jurisdiction to restrain the conduct of a hearing and the taking of other proceedings under the terms of the National Labor Relations Act;

7. In holding that the Board was probably attempting to act on a complaint not within its jurisdiction;

8. In affirming the decrees of the District Court.

REASONS FOR GRANTING THE WRITS

1. The decrees of the Circuit Court of Appeals are not in harmony with the precedents established by this Court.

While we believe the allegations of the Board's complaint (pars. 1, 2, 6, 8, R. 31–34) set forth a case well within the Board's jurisdiction, as defined in the recent decisions of this Court (*National Labor Relations Board* v. *Jones & Laughlin Steel Corp.; National Labor Relations Board* v. *Fruehauf Trailer Co.; National Labor Relations Board* v. *Friedman-Harry Marks Clothing Co.*, all *supra*), the fundamental question here presented is one of equity jurisdiction. The Act provides a plain and adequate remedy in the appropriate court for review of any order which the Board may make after due notice and hearing. Only when sustained by the court may the Board's order be enforced. Such review would encompass the various issues of fact and law attempted to be raised in the bills of complaint herein, including "the jurisdiction of the Board", "the regularity of its proceedings", and "all questions of constitutional right or statutory authority." The procedural provisions afford "adequate opportunity to secure judicial protection against arbitrary action in accordance with the well-settled rules applicable to administrative agencies set up by Congress to aid in the enforcement of valid legislation." *National Labor Relations Board* v. *Jones & Laughlin Steel Corp., supra*, p. 20. Consequently, the District Court had no

jurisdiction to enjoin the conduct of a hearing or the taking of further proceedings by the Board under the Act, and the court below should have reversed the decrees of the District Court and directed the dismissal of the bills upon that fundamental ground. *Metropolitan Co.* v. *Kaw Valley District,* 223 U. S. 519, 523; *Lyons* v. *Eagle-Picher Lead Co.,* decided May 27, 1937 (C. C. A. 10th).

All the contentions raised in the bills of complaint herein, including the various claims of alleged irreparable damage, were rejected in numerous decisions of other Circuits which this Court repeatedly declined to review on writs of certiorari at the last term, both prior and subsequent to the decision in the *Jones & Laughlin* case. See *Bradley Lumber Co.* v. *National Labor Relations Board,* 84 F. (2d) 97 (C. C. A. 5th), certiorari denied, October 12, 1936, No. 153; *Heller Brothers Co.* v. *Lind,* and six other cases, 86 F. (2d) 862 (App. D. C.), certiorari denied, March 15, 1937, Nos. 704–710; *Hatfield Wire & Cable Co.* v. *Herrick,* decided November 23, 1936 (App. D. C.), certiorari denied, March 15, 1937, No. 744; *Clark* v. *Marathon Electric Co.,* 88 F. (2d) 59 (C. C. A. 7th), certiorari denied, April 5, 1937, No. 752; *Elliott* v. *El Paso Electric Co.* and *Elliott* v. *Perrin et al.,* 88 F. (2d) 505 (C. C. A. 5th), certiorari denied, June 1, 1937, Nos. 1017, 1018; *Beman* v. *Independent Workers of Clayton Mark & Co.,* 88 F. (2d) 59 (C. C. A. 7th), certiorari denied, June 1, 1937, No. 956. The holding in the *Jones & Laughlin* case, and the dis-

positions of writs of certiorari to review the denial of injunctive relief under this Act, accord with the law as to equity jurisdiction long since established by this Court in analogous situations.[1]

2. The decrees of the Circuit Court of Appeals are in conflict with the latest decisions of every other Circuit which has passed on the question here presented.

Even prior to the five decisions of this Court on April 12, 1937, sustaining the validity of the Act and the appropriateness of its procedural machinery in all respects material here, the Circuit Courts of Appeals for the Second, Fifth, and Seventh Circuits, and the United States Court of Appeals for the District of Columbia, had held broadly that the District Courts were without jurisdiction to restrain hearings and other proceedings under the Act (see cases cited *supra*, p. 9; ***E. I. Dupont De Nemours Co.*** v. ***Boland,*** and three other cases, 85 F. (2d) 12, 15, 16 (C. C. A. 2d)); and the Circuit Courts of Appeals for the Sixth and Ninth Circuits had indicated a similar view in denying temporary injunctions pending appeal. ***Bemis Bag Co.*** v. ***Feidelson,*** Feb. 6, 1936 (C. C. A. 6th); ***Carlisle Lumber Co.*** v. ***Hope,*** 83 F. (2d) 92

[1] ***Spielman Motor Sales Co.*** v. ***Dodge,*** 295 U. S. 89; ***Federal Trade Commission*** v. ***Claire Furnace Co.,*** 274 U. S. 160; ***United States*** v. ***Los Angeles R. R. Co.,*** 273 U. S. 299; ***United States*** v. ***Illinois Central R. R. Co.,*** 244 U. S. 82; ***Anniston Manufacturing Co.*** v. ***Davis,*** No. 667, October Term, 1936, decided May 17, 1937.

(C. C. A. 9th), appeal dismissed, 85 F. (2d) 1010 (C. C. A. 9th). Subsequent to this Court's decisions of April 12, 1937, the Circuit Courts of Appeals for the Eighth and Tenth Circuits have likewise held that such bills for injunction should be dismissed for failure to follow the valid statutory procedure. *Pratt* v. *Oberman & Co.*, decided May 5, 1937 (C. C. A. 8th); *Lyons* v. *Eagle-Picher Lead Co.*, decided May 27, 1937 (C. C. A. 10th). See also *Bowen* v. *James Vernor Co.*, decided May 13, 1937 (C. C. A. 6th). Various decisions in the Fifth, Seventh, Eighth, and Tenth Circuits are squarely in conflict with the decrees at bar, in that they entailed a *reversal* of injunction decrees with directions to dismiss bills filed in the District Courts. *Elliott* v. *El Paso Electric Co.; Elliott* v. *Perrin; Clark* v. *Marathon Electric Co.; Beman* v. *Independent Workers of Clayton Marks & Co.; Pratt* v. *Oberman & Co.; Lyons* v. *Eagle-Picher Lead Co.*, all *supra*. The decrees of the First Circuit under consideration thus stand alone, contrary to those of every other intermediate court in the Federal judicial system.

3. The question presented is of great public importance.

The effect of the decision below is to substitute the District Court for the Board in the first instance to hear and determine questions under the Act, including particularly its applicability under the circumstances of the particular case. This ruling is subversive of all established principles of admin-

istrative law and equity jurisdiction. *White* v. *Johnson,* 282 U. S. 367, 373. It would nullify a carefully devised statutory procedure which has been sustained by this Court as valid and adequate, without even freeing the parties from injury which is incidental to every trial. It would destroy all the advantages of a body of experts who shall gain experience by length of service in dealing with a special problem. *Humphrey's Executor* v. *United States,* 295 U. S. 602, 625; *Florida* v. *United States,* 292 U. S. 1, 12. With respect to various plants of the employer at bar, it would lead to the absurd result that questions under the Act are tried in the first instance by the District Courts in the First Circuit, by the Board in the Southern District of California (*Bethlehem Shipbuilding Corp.* v. *Nylander,* 14 F. Supp. 201), and by the Board in the District of Columbia. *Bethlehem Shipbuilding Corp.* v. *Madden,* 86 F. (2d) 862 (App. D. C.), certiorari denied, March 15, 1937, No. 706.

CONCLUSION

Wherefore, it is respectfully submitted that this petition for writs of certiorari to review the judgments of the Circuit Court of Appeals for the First Circuit should be granted.

STANLEY REED,
Solicitor General.

CHARLES FAHY,
General Counsel,
National Labor Relations Board.

JUNE 1937.

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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 181

A. HOWARD MYERS ET AL., PETITIONERS

v.

BETHLEHEM SHIPBUILDING CORPORATION, LTD.

No. 182

A. HOWARD MYERS ET AL., PETITIONERS

v.

CHARLES MACKENZIE ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the District Court for the District of Massachusetts (R. 117, 222) applicable to both cases, is unreported, although the opinion of the District Court upon petitioner's motion to dismiss, argued at the same time but not involved in

this appeal, is reported in 15 F. Supp. 915 (R. 118–135). The original opinion of the Circuit Court of Appeals for the First Circuit (R. 229) is reported in 88 F. (2d) 154; the opinion denying leave to file a second petition for rehearing (R. 242) is reported in 89 F. (2d) 1000.

JURISDICTION

The decrees of the Circuit Court of Appeals were entered on February 12, 1937 (R. 232). A petition for rehearing (R. 232) was denied on April 5, 1937 (R. 236), and leave to file a second petition for rehearing (R. 236) was denied on May 13, 1937 (R. 243). The petitions for certiorari were filed herein June 30, 1937, and were granted October 11, 1937. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, notwithstanding the procedure and remedies provided in the National Labor Relations Act, the District Court possessed jurisdiction to grant equitable relief by injunction against the conduct of a hearing and other proceedings which had been or might be undertaken by the National Labor Relations Board pursuant to that Act.

STATUTE AND REGULATIONS INVOLVED

The text of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; U. S. C.,

Sup. II, Title 29, Sec. 151 *et seq.*), and the applicable rules and regulations made and published by the Board pursuant thereto appear in the record (pamphlet following R. 214).

The provisions of the Act are summarized in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 22–24. For the Court's convenience, the provisions pertinent here may be briefly reviewed.

The Act empowers the Board to prevent any employer from engaging in any unfair labor practice (listed in Section 8) affecting interstate or foreign commerce[1] and states that "this power shall be exclusive" (Section 10 (a)). The Board may issue its complaint and notice of hearing whenever it is charged that a person has engaged in or is engaging in an unfair labor practice forbidden by the Act. The person complained of may file an answer, appear, and adduce evidence. Interested persons may intervene (Section 10 (b)). If upon the testimony transcribed and filed with the Board, it is of the opinion that the person complained of has engaged in an unfair labor practice affecting commerce, the Board is directed to state its findings of fact, and to order him to cease and desist and to take such affirmative action as will effectu-

[1] The term "affecting commerce" is defined to mean "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." (Section 2 (7).)

ate the policies of the Act (Section 10 (c)). But if the Board is of the opinion that no unfair labor practice affecting commerce has been engaged in, it must state its findings of fact and dismiss the complaint (Section 10 (c)).

Violation of the Board's order carries no penalty. The appropriate Circuit Courts of Appeals, or in vacation, the District Courts, are given jurisdiction to enforce, modify or set aside the Board's order, upon the filing of a petition for enforcement by the Board or of a petition for review by any person aggrieved. The court acts on the entire administrative record, except that additional evidence may be ordered adduced before the Board upon stated grounds. The Board's findings as to the facts, if supported by evidence, are conclusive. The court's jurisdiction is stated to be "exclusive", subject only to review by this Court on certiorari or certification (Section 10 (e), 10 (f)).

Under Section 11, the Board is authorized to examine books and records and to issue subpoenas for the purposes of all hearings and investigations which are necessary and proper for the exercise of the powers vested in it under Section 10 (to prevent unfair labor practices) and Section 9 (to conduct investigations concerning representation). Such subpoenas can be enforced only by an appropriate order of a District Court of the United States (Section 11 (2)).

Willful interference with the Board, its members or agents in the performance of their duties

under the Act is punishable by fine or imprisonment (Section 12).

STATEMENT

The petitioner-defendants A. Howard Myers and Edmund J. Blake are respectively acting Regional Director and Regional Attorney of the National Labor Relations Board for the First Region, which includes the Commonwealth of Massachusetts. Petitioner-defendant Daniel M. Lyons was the Trial Examiner of the National Labor Relations Board duly appointed to hold the hearing enjoined in the instant case.[2]

[2] The duties of these officials are set out in the following rules of the Board:

ARTICLE II

"SEC. 5. After a charge has been filed, if it appears to the Regional Director that a proceeding in respect thereto should be instituted, he shall issue and cause to be served upon the respondent and the person or labor organization making the charge (hereinafter referred to as the 'parties to the proceeding') a formal complaint in the name of the Board stating the charges and containing a notice of hearing before a Trial Examiner at a place therein fixed and at a time not less than five days after the service of the complaint. A copy of the charge shall be attached to the complaint."

"SEC. 19. Any person or labor organization desiring to intervene in any proceeding shall file a motion in writing with the Regional Director issuing the complaint setting out the grounds upon which such person or organization claims to be interested. The original of such motion shall be signed and sworn to by the person or labor organization filing the motion, who shall file three additional copies of such motion for the use of the Board. Immediately upon filing such motion, the moving party shall serve a copy thereof upon

On April 13, 1936, upon a charge filed by the Industrial Union of Marine & Shipbuilding Workers of America, Local No. 5, the National Labor Relations Board, through its Regional Director at Boston, Massachusetts, petitioner A. Howard Myers, filed a complaint against the respondent Bethlehem Shipbuilding Corporation, Ltd., and gave notice of a hearing pursuant to Section 10 (b) of the Act (R. 31–35). The Board's complaint alleged that the company, a Delaware corporation engaged in the production, sale, and distribution of boats, ships, and marine equipment at Quincy, Massachusetts (called the Fore River Plant), had dominated and interfered with the formation and administration of a labor organization, known as

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each of the other parties to the proceeding. The Regional Director shall rule upon all such motions filed prior to the hearing, and the Trial Examiner shall rule upon all such motions filed at the hearing, in the manner set forth in Section 15 of this Article. The Regional Director or the Trial Examiner, as the case may be, may by order permit intervention in person or by counsel to such extent and upon such terms as he shall deem just. The Regional Director shall cause a copy of said ruling to be served upon each of the parties to the proceeding."

"SEC. 23. The hearing for the purpose of taking evidence upon a complaint shall be conducted by a Trial Examiner specifically designated by the Board, by the Chief Trial Examiner, or by the Regional Director. At any time a Trial Examiner may be designated to take the place of the Trial Examiner previously designated to conduct the hearing. Such hearings shall be public, unless otherwise ordered by the Trial Examiner.

"SEC. 24. It shall be the duty of the Trial Examiner to inquire fully into the facts as to whether the respondent has

the Plan of Representation of Employees, in that plant, and had contributed financial and other support to it, and had thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8 (1) and 8 (2), and Section 2 (6) and 2 (7) of the Act. The company filed no answer to the Board's complaint, and no petition for intervention was filed by the respondents in No. 182 or by any other interested person. The hearing was postponed pending determination of the applications by the company, and later by a group of employees, in the District Court for preliminary injunctions.

On April 27, 1936, the company filed in the District Court for the District of Massachusetts the

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engaged in or is engaging in an unfair labor practice affecting commerce as set forth in the complaint or amended complaint. Counsel for the Board, and the Trial Examiner, shall have power to call, examine, and cross-examine witnesses and to introduce into the record documentary or other evidence."

"SEC. 32. After a hearing for the purpose of taking evidence upon a complaint, the Trial Examiner shall prepare an Intermediate Report, which he shall file with the Regional Director issuing the complaint, who will thereafter transmit the original of the Intermediate Report to the Board in Washington, D. C., and cause a copy thereof to be served upon each of the parties to the proceeding. Such report shall contain (a) findings of fact, separately stated and numbered, and (b) recommendations as to what disposition of the case should be made, which may include, if it be found that respondent has engaged in or is engaging in the alleged unfair labor practice, a recommendation as to what affirmative action should be taken by respondent to bring about a condition in harmony with the law."

bill of complaint in No. 181, against petitioners Myers, Blake, and Lyons, each individually and in his official capacity with the Board, "and as the National Labor Relations Board" (R. 2–29). The bill prayed for a temporary and, upon a final hearing, a permanent injunction against the holding of the scheduled Board hearing and the taking of further proceedings under the Act, and also for a declaratory judgment that the Act as applied to the company was unconstitutional (R. 25–29). The bill described the manner in which the company operated (R. 5–7), and alleged that the company was not engaged in interstate commerce or in transactions directly affecting interstate commerce (R. 21), that the Act was unconstitutional and void (R. 21–24), and that the procedure provided in the Act did not afford the company an adequate remedy at law (R. 24–25). The bill alleged that the holding of the hearing and the taking of further proceedings would cause the company irreparable damage by putting it to inconvenience and expense, injuring its good-will, requiring the production of witnesses and business records, and disturbing harmonious relations with its employees (R. 9–11, 13–18). It is also alleged that respondents are in danger of prosecution under Section 12 of the Act. These allegations are considered in greater detail, *infra*, pp. 22, 36–37, 40–42.

On May 4, 1936, respondents in No. 182, both individually and as officers of the Plan of Representation of Employees at the Fore River Plant,

filed a bill of complaint (R. 146), and on May 7, 1936, a substituted bill of complaint (R. 151–166), also alleging that the Act and its application to them were unconstitutional, and praying that the proceedings before the Board be enjoined, and that a declaratory judgment be rendered.

The bill of complaint alleged that the Plan of Representation of Employees had existed in the plant since 1923, for the purpose of bargaining with the company with respect to wages, hours, working conditions and the settlement of disputes (R. 155–156); that the General Body of the Plan in the plant was the representative of all employees in dealing with their employer, and that the employees had no desire to alter the Plan in effect (R. 159); that if the existing representation of employees were altered, trouble would follow with the result that the plant would close (R. 159); and that the holding of the Board hearing would discredit the Plan and deprive the employees of their right to negotiate with the company thereunder (R. 159).

Upon the filing of the bills, restraining orders were entered and later continued (R. 57, 83, 109, 110, 146, 181, 182). Petitioners moved to dismiss the bills (R. 60–65, 192–197), and thereafter filed returns to the rules to show cause why temporary injunctions should not issue (R. 66–80, 197–213). In these returns the allegations of injury in the bills were denied. Petitioners also moved to quash the subpoenas in so far as they were designated

therein "as the National Labor Relations Board" (R. 81–82, 191–182).

Affidavits in each case were filed in support of the motion for temporary injunction (R. 86–106, 167–180, 182–190), and it was agreed by the parties that the affidavits in each case might also be deemed to have been offered in evidence in the other (R. 108, 190). Thus apart from the difference in the bills of complaint the records in the two cases are the same.

The bills and affidavits also alleged that a Plan of Employee Representation was adopted in 1923 (R. 90), that the relations between the Corporation and its employees since 1923 have at all times been harmonious and friendly (R. 91, 168, 173), that the great majority of the employees favor the Plan of Employee Representation (R. 169, 173–174) and that the company had not dominated or interfered with the action of its employees under the Plan (R. 107, 167–168, 175). There were general allegations that a case in 1934 before the Old Labor Board [3] had caused unrest and disturbed morale (R, 13–17, 102–104).

On May 27, 1936, following argument, the District Court handed down a memorandum to the effect that until petitioners prevailed in their mo-

[3] The reference is to the old National Labor Relations Board, established by Executive Order under Public Resolution No. 44, 73d Congress, 2d Session.

tions to dismiss, a temporary injuncton would issue restraining them in accordance with the prayer of each complaint (R. 117). Orders granting the preliminary injunctions were filed on May 28, 1936 (R. 112–114, 220–221), together with findings of fact and conclusions of law identical for both cases (R. 111–112, 219). The injunctions were granted as prayed against the conduct of hearings and the taking of further proceedings under the Act, except that they did not enjoin petitioners "as the National Labor Relations Board" (R. 113, 221). The District Court made no specific findings of fact, but found generally "that all of the facts alleged in the plaintiff's bill of complaint" were true, that certain subpoenas had been issued by the Board, and that it did not appear that any damage, inconvenience, or loss of rights would be suffered by any person if the Board hearing were postponed pending decision on the motions to dismiss (R. 111, 219). Its conclusions of law were (1) that there was grave doubt whether the Act was not wholly unconstitutional and void, (2) that if the Board hearing were held the plaintiffs would "suffer irreparable damage of the kinds alleged in its bill of complaint," and (3) that the court was not then "able to conclude that the plaintiff has a plain, adequate, and complete remedy at law" (R. 112, 219).

Thereafter, on July 22, 1936, the District Court denied the motions to dismiss (R. 118–135; 15 F.

Supp. 915). The District Court made no decision on the prayers for declaratory relief. The temporary injunctions granted May 28, 1936, are still in effect, and it was from the orders granting these injunctions that appeals were taken by petitioners herein.

The orders granting the preliminary injunctions were affirmed by the Circuit Court of Appeals for the First Circuit on February 12, 1937 (R. 229–232; 88 F. (2d) 184). On April 5, 1937, the Court of Appeals denied a petition for rehearing based upon the conflict between its ruling and those of other Circuit Courts of Appeals (R. 236). On May 13, 1937, the Circuit Court of Appeals denied petitioners' motion for leave to file a second petition for rehearing based upon the supervening decisions[4] of this Court holding the Act constitutional (R. 236, 243). Writs of certiorari to review the decrees entered by the Circuit Court of Appeals, affirming the decrees of the District Court granting the preliminary injunctions, were issued by this Court on October 11, 1937 (R. 244).

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[4] *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1; *National Labor Relations Board* v. *Fruehauf Trailer Co.*, 301 U. S. 49; *National Labor Relations Board* v. *Friedman-Harry Marks Clothing Co.*, 301 U. S. 58; *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103; *Washington, Virginia and Maryland Coach Co.* v. *National Labor Relations Board*, 301 U. S. 142.

SUMMARY OF ARGUMENT

The decision below affirming the issuance of an injunction against the holding of a hearing by the National Labor Relations Board is in conflict with decisions of the courts of appeals in every other circuit (except the Third, which has not passed on the issue) and in the District of Columbia.

I. This suit has been brought to enjoin the holding of an administrative hearing. The hearing can not result in an enforceable order until after a decision by the National Labor Relations Board and its affirmance by a circuit court of appeals. The procedural provisions of the Act provide an adequate opportunity to secure judicial protection against arbitrary action on the part of the Board. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 300 U. S. 1, 46. Respondents may not, in advance of any effort to enforce the Act against them and without resort to the remedies available to them under the Act, ask an equity court to hold them immune from the operation of the statute. This they may not do because the statute gives the Board and the circuit courts of appeals exclusive jurisdiction to determine the questions arising under it; because under the settled doctrine of this Court the exhaustion of the respondents' administrative remedies is a necessary prerequisite to judicial cognizance of the controversy, whether in law or equity; and because

in any event the existence of those remedies precludes resort to the extraordinary processes of equity. These principles apply when the question is whether respondents are properly subject to the Act under the commerce clause just as much as when other issues are involved. *Dalton Adding Machine Co.* v. *State Corporation Commission,* 236 U. S. 699.

II. The mere holding of an administrative hearing will not be enjoined by a court of equity. If the holding of such a hearing were in itself regarded as constituting irreparable injury, the requirement that administrative remedies must be exhausted before seeking judicial relief would be rendered nugatory.

The expense, annoyance, and inconvenience resulting from respondents having to prepare for and appear at the hearing are "incident to every sort of trial" and are not the kind of "irreparable injury which equity will interfere to prevent," but "part of the social burden of living under government." *Bradley Lumber Company* v. *National Labor Relations Board,* 84 F. (2d) 97, 100 (C. C. A. 5th), certiorari denied 299 U. S. 599. Nor does the possibility that harmonious relations between the respondents and their employees will be disturbed by the hearing (as is alleged in the bills) constitute irreparable damage cognizable in equity, as has already been determined in one case brought by the respondent corporation, as well as in other

cases. *Bethlehem Ship Building Corp., Ltd.* v. *Madden,* 86 F. (2d) 862 (Ct. App. D. C.), certiorari denied 300 U. S. 672. In any event the speculative and general assertions in the bills of complaint and the affidavits filed by respondents fall far short of proving that the mere holding of a hearing will have the consequences alleged.

III. Although the decision of a trial court granting an interlocutory injunction is ordinarily not to be disturbed on appeal, it is well established that such injunctions may be set aside when "contrary to some rule of equity, or the result of improvident exercise of judicial discretion" (*Meccano, Ltd.* v. *John Wanamaker,* 253 U. S. 136, 141), or where there is some "insuperable objection, in point of jurisdiction * * * to the maintenance of the suit" (*United States Fidelity & Guaranty Co.* v. *Bray,* 225 U. S. 205, 214). Inasmuch as respondents had not availed themselves of the administrative and statutory remedies provided by the Act, or shown any irreparable injury cognizable in equity, the granting of the injunctions in these cases was both contrary to a rule of equity and an improvident exercise of judicial discretion. Since the bills on their face are devoid of equity, this Court may not only set aside the orders granting the temporary injunctions, but should also dismiss the bills. *Mast, Foos & Co.* v. *Stover Manufacturing Co.,* 177 U. S. 485, 494.

ARGUMENT

Introduction

There have been 95 suits to enjoin the National Labor Relations Board or its officers from proceeding in accordance with the provisions of the National Labor Relations Act. Only in the cases at bar and in one other case also pending in the First Circuit do decrees restraining the Board or its officers remain outstanding. In every other circuit (except the Third, which has not passed on the issue) and in the District of Columbia, the courts of appeals have held that in view of the adequate remedies provided in the statute, equity lacked jurisdiction to grant the relief sought. In a number of these cases the circuit courts of appeals reversed decrees of the district courts granting temporary injunctions.[5] In other cases the circuit

[5] *Clark* v. *Lindemann & Hoverson Co.*, and four other cases, 88 F. (2d) 59 (C. C. A. 7th); *Clark* v. *Marathon Electric Co.*, 88 F. (2d) 59 (C. C. A. 7th) cert. den., 300 U. S. 681; *Beman* v. *Independent Workers of Clayton Mark & Co.*, 88 F. (2d) 59 (C. C. A. 7th) cert. den., 57 S. Ct. 941; *Beman* v. *Bendix Products Corp.*, 89 F. (2d) 661 (C. C. A. 7th); *Pratt* v. *Oberman & Co., Inc.*, 89 F. (2d) 786 (C. C. A. 8th); *Beman* v. *Iowa Manufacturing Co.*, 90 F. (2d) 249 (C. C. A. 8th); *Bowen* v. *James Vernor Co.*, 89 F. (2d) 968 (C. C. A. 6th); *Lyons* v. *Eagle Picher Lead Co.*, 90 F. (2d) 321 (C. C. A. 10th). Cf. also *Carlisle Lumber Co.* v. *Hope*, 83 F. (2d) 92 (C. C. A. 9th) and *Bemis Bro. Bag Co.* v. *Feidelson*, Feb. 6, 1936 (C. C. A. 6th), in which the Courts of Appeals refused stays pending appeal; and *Elliott* v. *El Paso Electric Co.*, 88 F. (2d) 505 (C. C. A. 5th), cert. den., 57 S. Ct. 945, in which a permanent injunction granted

courts of appeals affirmed decisions of the district courts dismissing the bills of complaint for want of equity.[6] Many of these decisions denying injunctions were rendered before the decisions of this Court upholding the constitutionality of the National Labor Relations Act, whereas the final decision below denying a rehearing was rendered after those decisions. The position of the other circuit courts of appeals was that the adequacy of the statutory remedy deprived equity of jurisdiction regardless of the constitutionality of the statute, or its applicability in the particular case.[7]

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by the District Court was reversed by the Circuit Court of Appeals.

[6] *E. I. Du Pont de Nemours & Co.* v. *Boland*, and three other cases, 85 F. (2d) 12 (C. C. A. 2d); *Newport News Shipbuilding & Dry Dock Co.* v. *Schauffler*, 91 F. (2d) 730 (C. C. A. 4th), cert. granted, No. 305, October Term, 1937; *Bradley Lumber Co.* v. *National Labor Relations Board*, 84 F. (2d) 97 (C. C. A. 5th), cert. den., 299 U. S. 559; *Heller Bros. Co.* v. *Lind*, and six other cases, 86 F. (2d) 862 (Ct. App. D. C.), cert. den., 300 U. S. 672. See also *General Motors Corp.* v. *Bajork*, 90 F. (2d) 248 (C. C. A. 8th); *Wilson & Co.* v. *Gates*, 90 F. (2d) 247 (C. C. A. 8th).

[7] *E. I. du Pont de Nemours & Co.* v. *Boland*, 85 F. (2d) 12 (C. C. A. 2d); *Bradley Lumber Co.* v. *National Labor Relations Board*, 84 F. (2d) 97 (C. C. A. 5th), cert. den., 299 U. S. 559; *Elliott* v. *El Paso Elec. Co.*, 88 F. (2d) 505 (C. C. A. 5th), cert. den., 57 S. Ct. 945; *Beman* v. *Independent Workers of Clayton Mark & Co.*, 88 F. (2d) 59 (C. C. A. 7th), cert. den., 57 S. Ct. 941; *Carlisle Lumber Co.* v. *Hope*, 83 F. (2d) 92 (C. C. A. 9th); *Heller Bros. Co.* v. *Lind*, 86 F. (2d) 862, cert den., 300 U. S. 672. The Eighth Circuit Court of Appeals, which had previously upheld the issuance of an injunction (*Stout* v. *Pratt*, 85 F. (2d) 172), changed

Two of the cases in which injunctions were denied were brought by the Bethlehem Shipbuilding Corporation itself in other circuits. Respondent's applications for an injunction on grounds substantially the same as those alleged herein were rejected in the Southern District of California (*Bethlehem Shipbuilding Corp.* v. *Nylander,* 14 F. Supp. 201) and in the District of Columbia (*Bethlehem Shipbuilding Corp.* v. *Madden,* 86 F. (2d) 862, cert. den. 300 U. S. 672).

The injunctions were granted by the District Court and affirmed by the Circuit Court of Appeals in the cases at bar on the ground that there was grave doubt as to the constitutionality of the Act (R. 113, 125, 220, 231; 88 F. (2d) 154, 155. See also 15 F. Supp. 915, 919). Such doubt was resolved by the decisions of this Court. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1; and its companion cases. Notwithstanding those decisions, however, the Circuit Court of Appeals denied the Board's motion for leave to file a second petition for rehearing (R. 242–243). Doubt as to the applicability of the Act to the company's business on the findings of the District Court appears to have been the reason for that denial (R. 243). While we share no similar

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its position after the decisions of this Court upholding the Act, on the ground that "the appellee, whether subject to the act or not, is required to avail itself of the remedies therein provided, the adequacy of which remedies can no longer be questioned." *Pratt* v. *Oberman & Co.,* 89 F. (2d) 786, 787.

doubt and believe that the allegations of the Board's complaint (pars. 1, 2, 6, 8; R. 31–34) set forth a case well within the Board's jurisdiction, as defined by this Court,[8] that question is not presented here. For the essential question raised by

[8] The Board's complaint alleged that the company "in the course and conduct of its business causes and has continuously caused large quantities of the raw materials used in the production of its boats, ships and marine equipment to be purchased and transported in interstate commerce * * *, and causes and has continuously caused the boats, ships and marine equipment produced by it to be sold and transported in interstate commerce * * *" (par. 2, R. 32). It also alleged that the unfair labor practices had led and tended to lead to strikes burdening and obstructing interstate commerce (par. 6, R. 33). The company's bill referred to the plant as an "integrated manufacturing plant" (par. 6, R. 5) at which "approximately five thousand employees" were engaged "in connection with the shipbuilding, designing, manufacturing and processing operations" of the company (par. 7, R. 6). In addition to the decisions of this Court in the *Jones & Laughlin*, *Fruehauf Trailer*, and *Friedman-Harry Marks* cases, decisions of the Circuit Courts of Appeals in cases involving manufacturing operations support the Board's position that on its allegations as to the facts the Act is applicable. *Jeffery-DeWitt Insulator Co.* v. *National Labor Relations Board*, 91 F. (2d) 134, 140 (C. C. A. 4th), certiorari denied, No. 368, October Term, 1937; *National Labor Relations Board* v. *Bell Oil & Gas Co.*, 91 F. (2d) 509 (C. C. A. 5th); *Renown Stove Co.* v. *National Labor Relations Board*, 90 F. (2d) 1017 (C. C. A. 6th); *General Motors Corp.* v. *Bajork*, 90 F. (2d) 248 (C. C. A. 8th); *Beman* v. *Iowa Mfg. Co.*, 90 F. (2d) 249 (C. C. A. 8th); *National Labor Relations Board* v. *Santa Cruz Fruit Packing Co.*, 91 F. (2d 790 (C. C. A. 9th) petition for certiorari pending, No. 536, October Term, 1937; *Lyons* v. *Eagle-Picher Lead Co.*, 90 F. (2d) 321, 323 (C. C. A. 10th).

this appeal is not whether the court below was correct in deeming the Act inapplicable, but whether the District Court had power to enjoin the Board's officers from holding a hearing to adduce the facts on that and other issues raised in orderly fashion in the Board's complaint, pursuant to the procedure established by the Act. To that question alone this brief is addressed.

It is our position that the respondents' remedy under the Act was adequate and exclusive, that the irreparable damages alleged in the complaints were not cognizable by a court of equity, and that therefore the District Court had no jurisdiction to grant the injunctions.

I

THE PROCEDURAL PROVISIONS OF THE ACT PROVIDE AN ADEQUATE REMEDY AGAINST ANY UNLAWFUL ATTEMPT TO ENFORCE IT, AND THEREFORE BAR INJUNCTIVE RELIEF IN THE DISTRICT COURTS

The basic objection to the maintenance of the present proceedings is that respondents may not, in advance of any effort to enforce the Act against the Corporation and without resort to the remedies available to them under the Act to prevent such enforcement, ask an equity court to hold them immune from the operation of the statute. This they may not do for the three-fold reason that the statute vests exclusive jurisdiction to entertain proceedings with respect to alleged violations of the Act in the Board and the Circuit Court of Appeals; that by the settled doctrine of this Court

the exhaustion of the respondents' administrative remedies is a necessary prerequisite to judicial cognizance of the controversy, whether in law or in equity; and that in any event the existence of the statutory remedies precludes resort to the extraordinary processes of equity.

The procedure provided in the National Labor Relations Act is substantially identical with that long established under Section 5 of the Federal Trade Commission Act. Proceedings are commenced by formal complaint based upon charges filed with the Board and an administrative hearing is held (Section 10 (b)). Interested parties, such as respondents in No. 182, may petition to intervene. The Board has no power to enforce any of its orders, but must apply to a Circuit Court of Appeals for enforcement (Section 10 (e)). The party aggrieved may also apply to a Circuit Court of Appeals to set aside an order issued by the Board (Section 10 (f)). If the Board should find on the record made in the hearing before it that an employer was not subject to its jurisdiction because not engaging in commerce as defined by the Act, or not engaged in unfair labor practices as defined by the Act, the pending complaint would be dismissed and the employer relieved of further proceedings. If the Board should find the case within its jurisdiction and the complaint sustained by the evidence, it would state its findings of fact, order the employer to cease and desist, and possi-

bly take affirmative action incidental thereto (Section 10 (c)). Such an order would not be self-enforcing and disobedience thereof would give rise to no cumulative or other penalties or fines. Only upon the affirmance of the order by the appropriate Circuit Court of Appeals, on petition by the Board or by any aggrieved person, would an employer be under any legal compulsion to comply.

In like manner, there is an adequate opportunity to defend against any unauthorized exercise of subpoena power. The Board's subpoenas are not self-enforcing, and appropriate defenses may be urged in any proceeding brought by the Board in a District Court to compel obedience (Section 11 (2)). *Federal Trade Commission* v. *Claire Furnace Co.*, 274 U. S. 160; *E. I. DuPont de Nemours & Co.* v. *Boland*, 85 F. (2d) 12 (C. C. A. 2d).[9]

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[9] Section 12 of the Act, which imposes criminal penalties upon persons "who shall willfully resist, prevent, impede, or interfere with any member of the Board or any of its agents or agencies in the performance of duties pursuant to this Act" is plainly irrelevant here. That Section "cannot be construed to provide sanctions to compel obedience to the Board's orders for the enforcement of which the statute requires affirmative court mandates." *Associated Press* v. *Herrick*, 13 F. Supp. 897, 900 (S. D. N. Y.); Sen. Rep. No. 573, 74th Cong., 1st Sess., p. 15. It applies to such conduct as assault upon the Board's agents, tampering with records or coercion of witnesses (H. Rep. No. 1147, 74th Cong., 1st Sess., p. 25), not to "a bonafide resistance * * * in order to secure a court test." *Bradley Lumber Company* v. *National Labor Relations Board*, 84 F. (2d) 97, 100, cer-

In *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 46–47, this Court recognized that the remedy under the statute was an adequate one. The Court said:

> The procedural provisions of the Act are assailed. But these provisions, as we construe them do not offend against the constitutional requirements governing the creation and action of administrative bodies. See *Interstate Commerce Commission* v. *Louisville & Nashville R. Co.*, 227 U. S. 88, 91. The Act establishes standards to which the Board must conform. There must be complaint, notice and hearing. The Board must receive evidence and make findings. The findings as to the facts are to be conclusive, but only if supported by evidence. The order of the Board is subject to review by the designated court, and only when sustained by the court may the order be enforced. Upon that review all questions of the jurisdiction of the Board and the regularity of its proceedings, *all questions of constitutional right or statutory authority,* are open to examination by the court. We construe the procedural provisions as affording *adequate opportunity to secure*

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tiorari denied 299 U. S. 559. In any event, Section 12 can be enforced only by the Attorney General or the proper United States Attorney. They are not parties to this suit, and it is not alleged that they have threatened respondents with prosecution under that Section. Cf. *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, 43; *Spielman Motor Sales Co.* v. *Dodge*, 295 U. S. 89; *Ex parte LaPrade*, 289 U. S. 444.

> *judicial protection against arbitrary action* in accordance with the well-settled rules applicable to administrative agencies set up by Congress to aid in the enforcement of valid legislation. [Italics supplied.]

A. *The Act Vests Exclusive Jurisdiction in the Board and the Circuit Courts of Appeals*

Since the remedy provided by the procedural provisions of the Act is adequate, as shown above, Congress has, of course, constitutional authority to declare that it shall be exclusive. *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337. That Congress has so provided, we submit, is open to no serious question.

Section 10 (a) of the Act confers upon the Board "exclusive" power "to prevent any person from engaging in any unfair labor practice * * * affecting commerce." This seems plainly to be a grant of power to determine in the first instance whether any such unfair labor practice has taken place—a grant which includes the power to make the initial determination both as to whether the person has engaged in the unfair practice and whether the practice affects commerce. The necessary result of the temporary injunctions issued in the present proceedings is to disable the Board from exercising its exclusive power to make these determinations.

Sections 10 (e) and 10 (f) of the Act, moreover, confer upon the circuit courts of appeals[10] ex-

[10] The Board may petition the district court if the Circuit Courts of Appeals are in vacation. Section 10 (e).

clusive jurisdiction to review, set aside, correct or enforce the orders of the Board. Had the Board in these cases issued an order against the Shipbuilding Corporation, it could not be contested that a district court would lack jurisdiction to enjoin its enforcement. The case stands no better because of the respondents' attempt to anticipate the issuance of an order. Apart from its encroachment upon the jurisdiction of the Board, such an attempt necessarily involves an impairment of the jurisdiction of the circuit courts of appeals. The district court here has undertaken to determine one of the very questions Congress has declared should be passed upon initially by the Board and then by the circuit courts of appeals—whether respondents' practices affect commerce within the meaning of the Act.

Taken together, the provisions of Sections 10 (a), 10 (e) and 10 (f) of the Act establish an orderly and unified method for the determination of questions arising out of the enforcement of the Act. The decisions of the courts below in these cases are plainly destructive of the scheme contemplated by Congress. They would introduce, in effect, an additional and patently uncontemplated step into the judicial and administrative processes established by the Act. Every proceeding instituted by the Board would be subject to being halted at the outset by a suit for an injunction in a district court, with review by the circuit court of appeals

and this Court, before pursuing the normal administrative and judicial course specifically provided by Congress.[11] The disastrous consequences to all parties in labor disputes of the resultant delay and expense need not be elaborated.

That Congress meant what it said when it declared that the jurisdiction of the Board and of the circuit courts of appeals should be exclusive appears plainly from the language of the House Committee Report (H. Rep. 1147, 74th Cong., 1st Sess., p. 24):

> any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may claim a review of such order in the appropriate circuit court of appeals, or in the Court of Appeals of the District of Columbia. It is intended here to give the party aggrieved a full, ex-

[11] Even a claim that the Act was invalid in its entirety would not have been cognizable in injunction proceedings. *Spielman Motor Sales Corp.* v. *Dodge*, 295 U. S. 89, 95, and cases there cited. No such claim, however, can now be made. The constitutionality of the Act as a whole is conclusively established by the decision of this Court in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, *supra*. This being so, these respondents can advance no claim which may not arise on the facts of virtually any case instituted under the Act. The contention that the labor practices in question do not affect commerce within the meaning of the Act may be raised in a wide variety of situations. And if equity has jurisdiction to restrain the Board on that ground, it is arguable that it may do likewise on the ground that no unfair labor practice within the meaning of the Act has been alleged or can be shown. From the standpoint of the basis of equity jurisdiction, i. e., irreparable injury, the two grounds may not be distinguished.

> peditious, and exclusive method of review in one proceeding after a final order is made. Until such final order is made the party is not injured, and cannot be heard to complain, as has been held in cases under the Federal Trade Commission Act.

In view of the doctrine established by numerous decisions of this Court (see pp. 28, 29, 36, 38, 39, *infra*) that administrative remedies must be followed before judicial relief is sought, Congress was entitled to suppose, as it thus clearly appears it did suppose, that injunctions would not be issued to restrain proceedings brought under the National Labor Relations Act.

B. *Apart from the Statutory Provisions as to Exclusiveness, Respondents cannot Obtain Equitable Relief Without Exhausting their Administrative and Statutory Remedies*

Even if Congress had failed explicitly to negative the jurisdiction of the district courts in injunction proceedings, such jurisdiction would have been precluded. Had respondents permitted the statutory procedure to be pursued, they would have been subjected to no penalty—as has been shown—until after all questions here raised had been passed upon by the circuit court of appeals and, if necessary, by this Court. Respondents here are seeking to enjoin the first step in an administrative proceeding, before they can possibly be said to be subject to any order or statutory provision causing them injury. As this Court said in

United States v. *Illinois Central R. Co.*, 291 U. S. 457, 463:

> The various steps to be taken constitute parts of the administrative process which must be completed before the extraordinary powers of a court of equity may be invoked.

The principle that a person is not entitled to demand judicial relief from a supposed injury, actual or threatened, until administrative remedies have been exhausted finds its most frequent application in equity. There, of course, it is reinforced and supplemented by the principle of equity jurisdiction that equity cannot act unless there is no adequate remedy at law and unless an irreparable injury is threatened. In the Federal courts, this limitation of equity jurisdiction has since the Judiciary Act of 1789 been expressly imposed by statute (Act of September 24, 1789, 1 Stat. 82; 28 U. S. C., Sec. 384):

> Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate and complete remedy may be had at law.

The cases are numerous in which this Court has held that failure to resort to the administrative process precluded invocation of "the extraordinary powers of a court of equity." See *Pittsburgh, etc., Ry.* v. *Board of Public Works*, 172 U. S. 32, 44, 45; *Arkansas Building & Loan Ass'n* v. *Madden*, 175 U. S. 269; *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210; *Red "C" Oil Co.* v. *North Carolina*, 222

U. S. 380, 394; *Dalton Adding Machine Co.* v. *State Corporation Commission,* 236 U. S. 699; *Union Pacific R. Co.* v. *Board of Commissioners,* 247 U. S. 282; *Federal Trade Commission* v. *Claire Furnace Co.,* 274 U. S. 160, 174; *Lawrence* v. *St. Louis-San Francisco Ry. Co.,* 274 U. S. 588; *St. Louis-San Francisco Ry. Co.* v. *Alabama Public Service Commission,* 279 U. S. 560; *White* v. *Johnson,* 282 U. S. 367; *Porter* v. *Investors Syndicate,* 286 U. S. 461; *Petersen Baking Co.* v. *Bryan,* 290 U. S. 570, 575; *Pacific Tel. & Tel. Co.* v. *Seattle,* 291 U. S. 300; *United States* v. *Illinois Central R. Co.,* 291 U. S. 457; *Hegeman Farms Corp.* v. *Baldwin,* 293 U. S. 163.

The principle in question, however, is not solely one of equity jurisdiction. This Court has specifically held that it is applicable likewise in proceedings at law. *First National Bank* v. *Board of County Commissioners,* 264 U. S. 450, 455. Compare *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337. The principle, therefore, is one of judicial administration—"that administrative remedies must be exhausted as a necessary prerequisite to a judicial challenge" of administrative action. *First National Bank* v. *Board of County Commissioners, supra.* The propriety of such a rule in cases in which courts are asked to restrain acts of government officers, undertaken in the course of official duty, is self-evident. It protects the courts from unnecessary burdens and avoids the generation of

needless friction with other branches of the Government.

The requirement of exhaustion of administrative remedies is frequently applied in cases in which an administrative order has already issued but in which administrative processes for the correction of possible error have not been invoked. *E. g., United States* v. *Illinois Central R. Co.*, 291 U. S. 457. Plainly the difficulty in the present cases is more fundamental. No order has yet been issued against the respondents. The only action thus far taken has been the issuance of a complaint and notice of hearing, and the issuance of subpoenas to attend such hearing, at which the propriety of taking action against the respondent Corporation will be duly considered. The substantive provisions of the Act have not yet been applied in any way. The respondents have suffered neither injury nor the threat of injury from the Act. They have merely been notified of a proposed hearing which, if it should ultimately lead to application of the Act, can do so only after due administrative deliberation followed by invocation of the judgment of a court. Under these circumstances respondents are not now entitled to be heard upon any question contingent upon the possible application of the Act as a result of such a hearing.

The fact that respondents deny the authority of the Board to issue any order whatever against the Shipbuilding Corporation affords no basis for de-

parture from the orderly processes laid down by the statute and required by the decisions of this Court. If the contention is correct, either no order will be issued or, if an order is issued, it will not be enforced. This Court has frequently rejected similar claims that an administrative procedure might be dispensed with because the administrative body lacked any power over the subject matter. *Federal Trade Commission* v. *Claire Furnace Co., supra; Dalton Adding Machine Co.* v. *State Corporation Commission, supra; St. Louis-San Francisco Railway Co.* v. *Alabama Public Service Commission, supra; Lawrence* v. *St. Louis-San Francisco Railway Co., supra.* In this case, as in those cases, the question relates to the application of a statute valid in its terms—not to the jurisdiction of a body established by an act claimed to be totally void. The language of the *Dalton* case rejecting the contention made is equally applicable here (236 U. S. at 700–701):

> The court below remarked that it was not contended that the statute was unconstitutional but was alleged only that it was feared that it might be enforced in such a way as to contravene the Commerce Clause and suggested that if proceedings should be instituted by the Commission there would be a hearing before it, with a right to appeal to the Supreme Court of Appeals, and, upon a proper showing, to take the case to this court, and that there was nothing to indicate that the Commission would not give

> the appellant a fair hearing or would attempt to enforce the law against it in an oppressive way. On this ground, without expressing an opinion as to the liability of the appellant under the statute, it held that no case for an injunction was made out.
>
> We agree with the District Court in its conclusion and in its grounds. Like it we leave on one side the merits of the appellant's claim of immunity and confine ourselves to deciding that no reason is shown for anticipating the ordinary course of the law. * * * The general principle is that it is not for the courts to stop officers of this kind from performing their statutory duty for fear that they should perform it wrongly.

The National Labor Relations Act only prohibits unfair labor practices affecting interstate commerce so as to make them subject to Federal power. Sections 10 (a), 2 (6, 7). *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1. In investigating each case, the Board must determine, as part of its statutory duty, whether interstate commerce is thus affected. If, after hearing, the Board errs in its determination as to jurisdiction, the Act affords adequate opportunity for that determination to be reviewed and set aside.[12] Upon the judicial review provided in

[12] To avoid any contention as to the possibility of waiver of constitutional rights, the Board's Rules and Regulations have at all times provided that the filing of an answer or

the Act, "all questions of the jurisdiction of the Board and the regularity of its proceedings, all questions of constitutional right or statutory authority, are open to examination by the court." *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 47.[13]

We conclude that the respondents are without standing to attack the validity of the Act in its application to the Shipbuilding Corporation because the district court lacked statutory jurisdiction over the proceedings and because, independently thereof, no controversy concerning the application of the Act which is cognizable in a court has yet arisen. The holding of the court below that the Board may be compelled to make a showing of "probable jurisdiction" over the subject matter of its inquiries before the inquiries have commenced, we submit, is not only destructive of the intention of Congress but subversive of established principles of administrative law and judicial procedure.

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other participation in Board proceedings shall not be deemed to waive any motions or objections. Article II, Sections 18, 28.

[13] Respondents cite such cases as *Crowell* v. *Benson*, 285 U. S. 22, to show that the statutory remedy is not adequate for the review of the Board's finding on the question of interstate commerce. The language quoted in the text from the *Jones & Laughlin* opinion would seem to dispose of that contention. Whatever may be the application of *Crowell* v. *Benson* to cases arising under the Act, the proper judicial forum for the determination of the question is the Circuit Court of Appeals after the Board has acted, and not the district courts before the Board has acted.

The fact that the district court in granting the injunctions here sought necessarily encroached upon the exclusive statutory jurisdiction of the Board and the circuit court of appeals to determine ultimate questions concerning the application of the Act, and in doing so anticipated any possible injury to the respondents from such application, are all-sufficient grounds for holding it to be without jurisdiction. The respondents, however, while relying on the invalidity of the Act in its application to the Shipbuilding Corporation to establish the illegality of the Board's action, urge as the basis for equitable intervention not irreparable injury from the application of the Act but from the mere holding of a hearing—that is, irreparable injury said to flow not directly from the enforcement of the Act, but incidentally or indirectly from its very administration. To the question raised by this contention we now turn.

II

RESPONDENTS ARE NOT ENTITLED TO ENJOIN THE HOLDING OF A HEARING

In view of the statutory procedure already described, it is plain that respondents are not in danger of any injury, irreparable or otherwise, resulting from orders of the National Labor Relations Board. Their complaint thus in substance comes

down to the contention that the mere holding of a hearing will cause them irreparable harm.

It follows *a fortiori* from the cases cited above in support of the proposition that administrative remedies must be exhausted that the holding of a hearing by the administrative body will not be enjoined. If expense and inconvenience resulting from the mere holding of an administrative hearing prior to ultimate judicial determination constituted irreparable injury, it is evident that the rules that one cannot complain of administrative action before the action is taken, and that one must exhaust administrative remedies before seeking relief in court would be rendered largely nugatory. Respondents have been able to point to no case in which the mere holding of a hearing as the first step in administrative proceedings has been restrained by a court of equity [14] and we have been able to find

[14] The cases cited in respondents' brief in opposition to the issuance of the writ of certiorari stand only for the general proposition that equity may act when the remedy at law is not adequate. *Watson* v. *Sutherland*, 5 Wall. 74; *Pierce* v. *Society of Sisters*, 268 U. S. 510; *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1; *Hitchman Coal & Coke Company* v. *Mitchell*, 245 U. S. 229; *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 592, 593; *City Bank Farmers Trust Co.* v. *Schnader*, 291 U. S. 24, 34; *Boyce* v. *Grundy*, 3 Peters 210, 215; *Kilbourn* v. *Sunderland*, 130 U. S. 505, 514–515; *Frederberg* v. *Whitney*, 240 Fed. 819, 822–823 (D. C. W. D., Wash.); *Davis* v. *Wakelee*, 156 U. S. 680, 688; *Ex parte Young*, 209 U. S. 123; *Union Pacific R. R. Co.* v. *Weld County*, 247 U. S. 282, 287; *Wallace* v. *Hines*, 253 U. S. 66, 68; *Dawson* v. *Kentucky Distilleries Co.*, 255 U. S. 288, 296. Cases such as *Terrace* v. *Thompson*, 263 U. S. 197; *Pierce* v.

none. In the few cases in which an attempt has been made to enjoin the holding of a hearing, equitable relief has been invariably denied. *Lawrence* v. *St. Louis-San Francisco Railway Co.*, 274 U. S. 588; *McChord* v. *Louisville & Nashville R. Co.*, 183 U. S. 483.

Even if we assume that, contrary to recognized equitable principles, administrative hearings might be enjoined under some circumstances, no such circumstances are found here.

The alleged injury of respondents is of two kinds. It is claimed that the holding of a hearing will harm respondent corporation and its employees (1) in that they will be subjected to the expense, annoyance and inconvenience of having to appear and give evidence, and (2) in that the harmonious relationship between the company and its employees will be disturbed and the confidence of

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Society of Sisters, 268 U. S. 510; *Ex parte Young*, 209 U. S. 123; *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365; *Pennsylvania* v. *West Virginia*, 262 U. S. 553; *Rickert Rice Mills, Inc.* v. *Fontenot*, 297 U. S. 110; *Carter* v. *Carter Coal Co.*, 298 U. S. 238, and others which might be cited, are clearly not in point. Injunctive relief was there properly afforded because the plaintiff would run the risk of incurring cumulative criminal or other penalties or exactions if he followed the normal procedure of the statute assailed as unconstitutional, or because the statute was self-operating and was presently effective against him. Under the statute at bar, no order of the Board is enforceable until approved by the appropriate circuit court of appeals, and no fines, penalties or exactions are incurred pending judicial review in that court. See pp. 21–22, *supra*.

the employees in the existing Plan of Representation destroyed.

1. We do not doubt that the respondent Corporation will be put to some expense, annoyance and inconvenience if it defends itself before the Board. But as the Seventh Circuit pointed out, this "is no adequate reason for invoking the aid of equity, as expense, annoyance and inconvenience are present in some degree in all litigation." *Beman* v. *Independent Workers of Clayton Mark & Co.*, 88 F. (2d) 59, 60 (C. C. A. 7th), certiorari denied, 57 S. Ct. 941. The contention that the Board's proceedings "will require the attendance of officers and employees at hearings, the employment of counsel, and like matters" has likewise been rejected, the Court of Appeals for the District of Columbia pointing out that "these annoying incidents are not enough of themselves to establish a case for equitable relief." *Heller Brothers* v. *Lind, Bethlehem Shipbuilding Corp.* v. *Madden,* and companion cases, 86 F. (2d) 862, 863, certiorari denied, 300 U. S. 672. Both courts approved the statement of the Fifth Circuit in the *Bradley Lumber* case, that "these things are incident to every sort of trial and are part of the social burden of living under government. They are not the irreparable damage which equity will interfere to prevent; and a suit in equity would not wholly obviate them." *Bradley Lumber Co.* v. *National Labor Relations Board,* 84 F. (2d) 97, 100 (C. C. A.

5th), certiorari denied, 299 U. S. 559. To a considerable extent these factors will also be present if the first hearing is held before a district court instead of by the Board.

In rejecting a similar attempt to prevent the holding of a hearing by the Federal Trade Commission, the Circuit Court of Appeals for the Eighth Circuit declared in *Chamber of Commerce of Minneapolis* v. *Federal Trade Commission*, 280 Fed. 45, 48:

> The real gist of the complaint here is that it is claimed, and with plausibility, that the chief petitioner is not subject to the jurisdiction of the Federal Trade Commission; that the commission is proceeding erroneously and in excess of its powers; that the taking of the testimony before a final order can be made will be very expensive; and that a grievous burden is being inflicted upon petitioners, for which an ultimate setting aside of any order that may be made will not adequately compensate them. This is true in some degree of any order of the commission which may finally be set aside. The law does not contemplate that commissions of this nature will act arbitrarily nor without probable cause. It is, of course, conceivable that they may do so; but such a possibility cannot justify this court in exceeding its statutory powers and authority.

Decisions of this Court and of Circuit Courts of Appeals with respect to claims of similar irreparable injury are to the same effect. *United States* v. *Los Angeles & Salt Lake R. Co.*, 273 U. S. 299,

314 (claim that valuation would injure carrier's credit with public); *Pittsburgh & W. V. Ry. Co.* v. *Interstate Commerce Commission,* 280 Fed. 1014 (the expense of court costs); *Richmond Hosiery Mills* v. *Camp,* 74 F. (2d) 200, 201 (allegation that complainant's employees would be disconcerted, credit impaired and orders unfilled).

2. What has been said with respect to the cost and inconvenience of attending a hearing also applies to the allegations that the hearing will disturb the harmonious relationship existing between the Corporation and its employees under the existing Plan of Employee Representation, or impair the efficiency of the employees. *Cf. United States* v. *Los Angeles & Salt Lake R. Co.,* and *Richmond Hosiery Mills* v. *Camp,* both *supra.* The same contention has been made unsuccessfully in other injunction suits brought to restrain proceedings under the National Labor Relations Act.

In the *Bradley Lumber* case, the Circuit Court of Appeals for the Fifth Circuit conceded that "no doubt an investigation may * * * stir up some feeling among employees." 84 F. (2d), at 100. The Court of Appeals for the District of Columbia, in passing upon the same claim in an equity suit brought by the Bethlehem Shipbuilding Corporation, respondent in No. 181 herein, declared that:[15]

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[15] Seven cases were decided by the Court of Appeals for the District of Columbia in one opinion, *sub nom Heller Bros. Co.* v. *Lind,* 86 F. (2d) 862. The Bethlehem Ship-

> the threatened damage is that the proposed activities of the Board under the provisions of the act must inevitably result in friction, discord, loss of efficiency, and destruction of morale among employees. In other words, that the hearings and elections proposed to be had will result in disturbing the harmonious relations of appellants and appellants' employees, and in addition will require the attendance of officers and employees at hearings, the employment of counsel, and like matters. But we think that these annoying incidents are not enough of themselves to establish a case for equitable relief.

Thus even if the allegations as to this kind of irreparable injury are to be given full credence, respondents are not entitled to equitable relief. Detailed examination of the allegations will demonstrate, however, that they consist only of general assertions, entirely speculative in character, which are not sufficient to support the far-fetched claims of irreparable injury based upon them.

Whether respondents have suffered irreparable injury must be determined on a record consisting of the verified bills of complaint and certain affidavits (R. 86–106, 167–180, 182–190). In No. 181, the bills and affidavits allege that:

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building Corporation was plaintiff in one of these cases. Certiorari was denied. *Bethlehem Shipbuilding Corporation, Ltd.* v. *Madden*, 300 U. S. 672.

(1) The Board's charge against respondent corporation will cause it to incur the odium and ill-will of the public and its employees as a violator of the laws of the United States (R. 9–10, 93). This general language is not explained or made more definite anywhere in the record. It is found only in the bill of complaint, verified by a vice president of the corporation, and in an affidavit of the General Manager of the Fore River plant.

(2) The pendency of the Board's proceeding and the holding of a hearing will damage the friendly, pleasant and harmonious relations existing between the company and its employees, impair the efficiency of the employees through the creation of disturbing and upsetting conditions, prevent the company from bargaining freely with its employees, and thereby lessen the "prospective profits" of the Shipbuilding Corporation (R. 17–19, 92–93). These statements also are found only in the bill of complaint and in the affidavit of the General Manager. No facts in support of these general allegations appear anywhere in the record, other than the equally general allegations as to the effect of the prior hearing in 1934 before the old Labor Relations Board (R. 13–17, 102–104). It appears from the bill itself that, despite that hearing, the Plan of Representation was effective, and the relations between the parties thereto harmonious, at the time when the bill was filed (See R. 12–13, 156).

In No. 182, it was alleged in the bill that the hearing would cause the Plan of Employee Representation to be discredited, and the plant to close. The affidavits in support of this claim declare only that the holding of a hearing "will destroy the confidence of the employees in the Plan and will remove the support of many of the employees from the Plan" (R. 169–174), and that this "will deprive the employees of the results of many years of successful operation of the Plan" (R. 170–172).

Such broad allegations assuredly are not to be taken at their face value.[16] All of the allegations and statements are both general and highly speculative; they are nothing more than interested witnesses' conjectures as to what may happen in the future. They do not attempt to point out how or why the consequences predicted will result from the mere holding of a hearing. If the allegations are considered in connection with other statements in the affidavits submitted by respondents that the Corporation has never interfered with its employees' choice of representatives and that the vast majority of its employees support the Representation Plan and are satisfied with it (R. 107–108, 168–169, 171–172, 173–175, 177–178, 179), they are

[16] Respondent's original bill of complaint, which was verified, contained allegations of fact which were later abandoned, such as that the Board has scheduled a hearing under Section 9 (c) of the Act for the purpose of investigating a controversy concerning representation (R. 209–213).

hardly credible. Certainly they are insufficient to warrant the granting of injunctive relief.

The finding of the District Court that "all of the facts alleged in the plaintiffs' bill of complaint (as distinguished from statements and conclusions of law)" (R. 112) were true was expressed only in the general language quoted. The District Judge did not examine the evidence in his findings or opinions, or indicate which statements he regarded as decisive. The Circuit Court of Appeals has not stated in its opinions that it reexamined the evidence, or that, exercising its independent judgment, it concurred in the findings of fact of the District Court. In any event, the record below consisted entirely of the written bills and affidavits, and this Court is just as capable of forming a judgment from those documents as were the courts below. Since there was no oral evidence, the trial court had no advantage over this Court in passing upon the sufficiency of respondents' allegations and general statements.

III

THIS COURT SHOULD SET ASIDE THE TEMPORARY INJUNCTIONS AND DISMISS THE BILLS OF COMPLAINT

Although the decision of a trial court granting an interlocutory injunction is ordinarily not to be disturbed on appeal, it is well established that such injunctions may be set aside when *"contrary to some rule of equity,* or the result of improvident

exercise of judicial discretion." *Meccano Ltd.* v. *John Wanamaker,* 253 U. S. 136, 141; *Prendergast* v. *New York Telephone Company,* 262 U. S. 43, 50–51; *National Fire Insurance Co.* v. *Thompson,* 281 U. S. 331, 338; *Alabama* v. *United States,* 279 U. S. 229, 231; *Public Service Commission of Wisconsin* v. *Wisconsin Telephone Company,* 289 U. S. 67, 70; *Rogers* v. *Hill,* 289 U. S. 582, 587. In *Lawrence* v. *St. Louis-San Francisco Ry. Co.,* 274 U. S. 588, this Court reversed an order of a three-judge district court granting a temporary injunction when it appeared that adequate administrative remedies before state tribunals had not been exhausted. See also *Cavanaugh* v. *Looney,* 248 U. S. 453. This ruling is plainly applicable here.[17]

Moreover, this Court has frequently observed that in reviewing orders granting temporary injunctions, the appellate court is "authorized to review the whole of the interlocutory decree, not merely the part granting the injunction, and also to determine whether there was any insuperable objection, *in point of jurisdiction* or merits, to the maintenance of the suit, and, if there was, to direct a final decree dismissing the bill." *United States Fidelity and Guaranty Company* v. *Bray,* 225 U. S. 205, 214; *Denver* v. *New York Trust*

[17] In upholding the issuance of temporary injunctions in *Prendergast* v. *New York Telephone Company,* 262 U. S. 43, and *Ohio Oil Company* v. *Conway,* 279 U. S. 813, this Court pointed out that there were no administrative remedies which had not been availed of under the state laws.

Company, 229 U. S. 123, 136; *Metropolitan Water Company* v. *Kaw Valley Drainage District,* 223 U. S. 519, 523; *Ex parte National Enameling and Stamping Company,* 201 U. S. 156, 162; *Mast, Foos & Co.* v. *Stover Mfg. Co.,* 177 U. S. 485, 494; *Meccano Ltd.* v. *John Wanamaker,* 253 U. S. 136; *Smith* v. *Vulcan Iron Works,* 165 U. S. 518, 525. Both the circuit courts of appeals and this Court possess this power in reviewing orders granting temporary injunctions. *Denver* v. *New York Trust Company, supra.* "If the bill be obviously devoid of equity upon its face, and such invalidity be incapable of remedy by amendment; * * * we know of no reason why, to save protracted litigation, the court may not order the bill to be dismissed." *Mast, Foos & Co.* v. *Stover Mfg. Co., supra; Ex parte National Enameling and Stamping Company, supra; Smith* v. *Vulcan Iron Works, supra.* "If insuperable objection to maintaining the bill clearly appears, it may be dismissed and the litigation terminated." *Meccano Ltd.* v. *John Wanamaker,* 253 U. S. 136, at 141.

In the cases at bar the issuance of temporary injunctions was contrary to certain fundamental "rules of equity" and to the exclusive statutory scheme of administration established by Congress. *Supra,* pp. 24–34. Consequently, in accordance with the principles just stated, the temporary injunction decrees granted by the District Court should have been reversed by the court below and

remanded with direction to dismiss the bills.[18] This is the procedure which has been followed by a number of circuit courts of appeals in cases in which temporary injunctions had been granted by district courts restraining the Board or its officers from proceeding under the statute. *Supra*, p. 16, footnote 5.

The reversal of such injunctions is particularly important in this class of cases. For the issuance of a temporary injunction does not merely preserve the *status quo;* the inevitable result of the temporary injunction is that the trial of the issue is

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[18] The District Court lacked jurisdiction over the prayers for the declaratory judgments (R. 29, 164) as well as for the injunctions. The Federal Declaratory Judgments Act (48 Stat. 955; 28 U. S. C. § 400) applies only to "cases of actual controversy" in the constitutional sense and does not change the essential requisites for the exercise of judicial power. *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227, 239–40; *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 325. The allegations of the bills did not establish "a real and substantial controversy admitting of specific relief through a decree of a conclusive character," and hence the prayers for declaratory judgments were improper. *Aetna Life Insurance Co.* v. *Haworth*, *supra*, at 241; *Bradley Lumber Co.* v. *National Labor Relations Board*, 84 F. (2d) 97, 100 (C. C. A. 5th), cert. den., 299 U. S. 559. Moreover, the granting of relief under the Federal Declaratory Judgments Act is a discretionary matter, and Congress did not intend that Act to be employed where, as here, a special statutory method for the determination of the particular type of case has been provided. In Borchard, *Declaratory Judgments* (1934), p. 156, the author stated:

"Where, however, a *special statutory* method for the determination of the particular type of case has been provided,

transferred to the District Court. The machinery established by the Act cannot operate until the District Court determines questions of law and fact committed by Congress to the Board and the Circuit Courts of Appeals. The granting of temporary injunctions thus completely upsets the statutory plan.

CONCLUSION

The decisions below are subversive of established principles of administrative law. The issue raised by the instant cases is of course pertinent not simply to the administration of the National Labor Relations Act but to the operation of many other statutes entrusted by legislatures to administrative and quasi-judicial bodies. The effect of the decrees below is to nullify the carefully devised statutory procedure set up by Congress, a procedure which this Court has held to be valid and adequate. The decrees below in effect substitute the District Court for the Board as the tribunal to hear and determine what Congress declared the Board exclusively should hear and determine in the first instance. They disregard the advantages of initial proceedings before experts experienced by length of service in dealing with the special problem.

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it is not proper to permit that issue to be tried by declaration. This would amount to ousting of its jurisdiction a statutory court prescribed for the particular case, and it was not intended that a declaration should be employed for such a purpose. This, however, is quite different from refusing a declaration merely because a general or common-law remedy might have been invoked."

Humphrey's Executor v. *United States*, 295 U. S. 602, 625; *Florida* v. *United States*, 292 U. S. 1, 12; *United States Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, 485.

We submit that the respondents in both cases had an exclusive and an adequate remedy at law, that their allegations of injury were not cognizable in equity, and that therefore the bills should have been dismissed for want of both statutory jurisdiction and equity jurisdiction. Accordingly, the decrees of the Circuit Court of Appeals for the First Circuit should be reversed and the cases remanded to the District Court with direction to dismiss the bills.

Respectfully submitted.

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Supreme Court of the United States

October Term, 1937

No. 181

A. HOWARD MYERS *et al.*, Individually and as the National Labor Relations Board,

Petitioners,

v.

BETHLEHEM SHIPBUILDING CORPORATION, LTD.,

Respondent.

BRIEF ON BEHALF OF THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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August 11, 1937.

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Supreme Court of the United States

October Term, 1937

No. 181

A. HOWARD MYERS *et al.*, Individually and as the National Labor Relations Board,
Petitioners,

v.

BETHLEHEM SHIPBUILDING CORPORATION, LTD.,
Respondent.

BRIEF ON BEHALF OF THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The memorandum of the District Court for the District of Massachusetts upon the granting of the preliminary injunction (R., p. 117) is unreported. The opinion of the District Court upon the motion of the petitioners to dismiss the bill of complaint, which, as petitioners state, is not involved in this appeal, is reported in 15 F. Supp. 915. The opinion in the Circuit Court of Appeals for the First Circuit (R., p. 229) with respect to which certiorari is sought is reported in 88 F. (2d) 154 and the opinion of said Court (hereinafter called the Court of Appeals) denying the

motion of the petitioners for leave to file a second petition for rehearing (R., p. 242) has not yet been reported.

JURISDICTION

The decree of the Court of Appeals was entered February 12, 1937 (R., p. 232). A petition for rehearing (R., p. 232) was denied by the Court of Appeals on April 5, 1937 (R., p. 236), and leave to file the above-mentioned second petition for rehearing (R., p. 236), made after the decisions of this Court rendered April 12, 1937, in the five cases* involving the National Labor Relations Act (hereinafter called the Act†), was denied on May 13, 1937 (R., p. 243). Jurisdiction of this Court is invoked by the petitioners under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.**

QUESTION PRESENTED

The question involved in this suit on the petition for certiorari now before this Court is whether the District Court abused its discretion or violated any rule of equity in granting the preliminary injunction against the holding

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*_The Associated Press_ v. _National Labor Relations Board,_ (No. 365, October Term, 1936); 57 Sup. Ct. 650; _National Labor Relations Board_ v. _Jones & Laughlin Steel Corporation,_ (No. 419, October Term, 1936); 57 Sup. Ct. 615; _National Labor Relations Board_ v. _Fruehauf Trailer Co.,_ (Nos. 420 and 421, October Term, 1936); 57 Sup. Ct. 642; _National Labor Relations Board_ v. _Friedman-Harry Marks Clothing Co., Inc.,_ (Nos. 422 and 423, October Term, 1936); 57 Sup. Ct. 645; _Washington, Virginia and Maryland Coach Company_ v. _National Labor Relations Board,_ (No. 469, October Term, 1936); 57 Sup. Ct. 648.

†July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. §§151-166, incl.

**Mar. 3, 1891, c. 517, §6, 26 Stat. 828; Mar. 3, 1911, c. 231, §240, 36 Stat. 1157; Feb. 13, 1925, c. 229, §1, 43 Stat. 938; 28 U. S. C. 347(a).

by the petitioners of a hearing (hereinafter called the scheduled hearing) for the purpose of determining whether or not the respondent, Bethlehem Shipbuilding Corporation, Ltd. (hereinafter called the Shipbuilding Corporation), has engaged at its Fore River Plant in any so-called "unfair labor practices" under the Act.

STATUTE AND REGULATIONS INVOLVED

The Act involved is the National Labor Relations Act which appears in the record (pp. 17-27 of the pamphlet following R., p. 214). The Rules and Regulations of the National Labor Relations Board (hereinafter called the Labor Board) which are applicable likewise appear in the record as Exhibit A-2 to the bill of complaint (R., pp. 35-36).

STATEMENT

In accordance with the provisions of Rule 27 of the Rules of this Court, we set forth the following corrections of and additions to the statement contained in the petition for certiorari:

The Shipbuilding Corporation instituted this suit by filing its bill of complaint in equity for an injunction (and petition for a declaratory judgment) against the holding by the petitioners of the scheduled hearing. The petitioner Lyons, who had been designated to act as Trial Examiner for the Labor Board, was personally served with process within the jurisdiction of the District Court,* as were also the other petitioners, Myers and Blake (R., p. 60).

*The statement to the contrary in the petition (p. 5) is incorrect.

This suit was heard in the District Court on the sworn bill of complaint and affidavits including those filed by various officials and employees of the Shipbuilding Corporation. It was stipulated in the District Court that the affidavits filed in the suit of *MacKenzie, et al.* v. *Myers, et al.* (No. 182 on petition for writ of certiorari to this Court) brought by employees of the Shipbuilding Corporation against the petitioners and heard with this suit in the District Court might also be considered in this suit (R., p. 112).

In the bill of complaint the Shipbuilding Corporation set forth in full the facts regarding the business conducted by it at the plant at which the Labor Board alleges that the Shipbuilding Corporation has been engaged in unfair labor practices (hereinafter called the Fore River Plant) and set forth the pertinent facts regarding its relations with its employees there. The Fore River Plant is the only plant involved in this suit.

The District Court on the granting of the preliminary injunction found all of the facts alleged in the bill of complaint (as distinguished from statements and conclusions of law) to be true (R. p. 111).

The Fore River Plant is a complete and independent manufacturing plant for the designing and building of vessels of every type and kind (Bill, par. 6, R., p. 5; Aff. Gould R., pp. 89-90); and the vessels and products built at the Fore River Plant are built entirely on specific contract (Bill, pars. 7 and 8, pp. 6-7). In designing and building vessels at said Plant it is necessary that the Shipbuilding Corporation, and the Shipbuilding Corporation does, fabricate and shape in its shops especially for each vessel built all materials used therein and also builds for the most part the boilers and main propelling machinery for each such vessel; and the finished vessels bear no

resemblance to the materials used in building them and are of a far greater value than such materials, the cost of such materials representing less than half of the cost of building such vessels, the increase in value being due to the manufacturing, fabricating and building operations performed by the Shipbuilding Corporation at said Plant (Bill, par. 8, p. 7; Aff. Gould, R., pp. 88-89).

These vessels and other products are all delivered to the purchasers at the Fore River Plant (Bill par. 8, R., p. 7).

The bill of complaint alleges that neither the transaction of the business of the Shipbuilding Corporation at the Fore River Plant nor its relations with its employees with respect thereto constitute interstate commerce; that they do not directly burden or obstruct such commerce or the free flow thereof; that they do not tend to lead, or lead, to labor disputes; that they do not burden or obstruct such commerce, or the free flow thereof, or tend to lead to labor disputes burdening or obstructing such commerce or the free flow thereof; that such transactions do not occur, or such relations exist, in the course or current of interstate commerce, nor are they a part of the operations of instrumentalities of such commerce (Bill, par. 22, R., p. 21).

The District Court also found to be true all of the allegations of fact in the bill of complaint filed by employees in No. 182, which among other things alleges that the employees of the Shipbuilding Corporation at the Fore River Plant were engaged wholly in intrastate activities which did not burden, obstruct or affect interstate commerce (R., pp. 111, 219).

In March, 1923, the Plan of Employees' Representation, which is in effect at the Fore River Plant at the present time as it has been amended from time to time by the employees, was adopted. Said Plan (hereinafter called the

Plan) is operated entirely by the employees without any domination, interference, intimidation or coercion on the part of the Shipbuilding Corporation. Uncontradicted affidavits both by officials of the Shipbuilding Corporation and by employees at the Fore River Plant, who are in a position to know, demonstrate the fact that the Shipbuilding Corporation has not dominated or interfered with its employees in any way at any time up to the time of the hearing in this suit (Bill, pars. 20-21, R., pp. 19-20; Aff. Wakeman, R., pp. 107-108; MacKenzie, R., pp. 108, 167-168; McDermott, R., pp. 108, 174-175).

Prior to March, 1923, when the Plan was adopted at the Fore River Plant, labor conditions had been bad. Particularly during the years from the period of the World War until the Plan went into effect there were intermittent labor disputes and frequent strikes and walkouts by groups of employees in various sections and departments of the Fore River Plant, with the result that the efficiency of the employees there was impaired and thereby operations were interfered with and in general conditions were unsettled and operations impeded and the existence of pleasant and harmonious relations between the Shipbuilding Corporation and its employees was prevented (Aff. Gould, R. pp. 90-91; MacKenzie, R., pp. 108, 168; McDermott, R., pp. 108, 173).

A very marked change took place in the labor conditions among the employees at the Fore River Plant almost immediately upon the adoption of the Plan, and, in marked contrast to the conditions which existed at the Fore River Plant during the period just described above, there have been no labor disturbances or labor trouble of any nature whatsoever at the Fore River Plant since the adoption of the Plan. All questions concerning rates of pay, wages,

hours of employment and other conditions of employment and all grievances and other questions of interest to employees have been expeditiously and satisfactorily settled from time to time through collective bargaining between the management and the Employees' Representatives elected for the purpose under the Plan by the employees at the Fore River Plant voting in Nominations (primaries) and Elections by secret ballot. As a result of the operations of the Plan since 1923, in almost constantly increasing measure, there have existed and there now exist at the Fore River Plant pleasant, friendly and harmonious relations between the Shipbuilding Corporation and its employees (Bill, pars. 15, 19, R., pp. 13, 17; Affs. Gould, R., p. 91; Hannabury, R., pp. 108, 177-178; Harvey, R., pp. 108, 171-172).

Such Employees' Representatives, who are elected for the purpose of representing the employees in collective bargaining, were elected by the votes of over 96% of the employees eligible under the Plan to vote who were at the Plant on the day of the Election, and such employees represented practically all of the employees of the Shipbuilding Corporation at the Fore River Plant* (Bill, par. 21, R. p. 20).

In 1934 and 1935 the predecessor of the Labor Board, in existence under Public Resolution 44—73rd Congress† (hereinafter called the Old Labor Board) conducted a proceeding instituted on the complaint of Local No. 5 of the

*The record shows that 96% or 97% and 97.2%, respectively, cast good ballots that were counted in March, 1935 and March, 1936, respectively (Aff. Barker, R., pp. 108, 179; Supp. Aff. Barker, R., pp. 110, 188). The record does not, of course, show beyond 1936. It is a fact, however, that in March, 1937, 98% of the employees cast good ballots that were counted.

†June 16, 1933, c. 90, Title I, 48 Stat. 195.

Industrial Union of Marine and Shipbuilding Workers of America, the complaining party upon whose charge the complaint before the Labor Board involved in this suit is based (Bill, par. 16, R., pp. 13-14; Aff. Collins, R., pp. 102-103). The proceeding on that complaint and the decision of the Old Labor Board thereon after lengthy hearings (hereinafter called the First Fore River Case) have an important bearing upon this suit, for in such proceeding the operation of the Plan then and now in effect at the Fore River Plant and the relations between the Shipbuilding Corporation and its employees there were described at length by witnesses and were thoroughly considered. The questions which were involved in the First Fore River Case were fundamentally the same as the main questions involved in this suit (Bill, par. 18, R., p. 16).

On February 13, 1935, or about 4½ months after the date of the first hearing in the First Fore River Case, the Old Labor Board unanimously decided that the Shipbuilding Corporation was not guilty of the charges made against it and refused to take the action against it which had been requested by Local 5 of the Industrial Union (Bill, par. 16, R., p. 14).

The out-of-pocket cost to the Shipbuilding Corporation in connection with the First Fore River Case was in excess of $15,000, and the hearings in such Case consumed a total of 2,500 hours of working time of employees, foremen and leading men, and also caused the loss of many more hours in connection with and in preparation for such hearings. Such hearings, similarly, caused a loss of time of important officials of the Fore River Plant, particularly the Vice-President of the Shipbuilding Corporation in charge of all of its plants and also the General Manager and As-

sistant General Manager of the Fore River Plant, who spent by far the greater part of the month of October, 1934, in connection with such hearings (Bill, par. 17; R., pp. 14-16; Aff. Collins, R., pp. 102-104).

The Shipbuilding Corporation also suffered damage (more serious, in fact, than that above described) as a result of such Case in the disturbance caused to its employees and apprehension which they manifested, which resulted in the lowering of their morale and gave rise to unsettled conditions among them which impaired the efficiency of the operations of the Fore River Plant and impeded operations there (Aff. Collins R., p. 103; Supp. Aff. McDermott R., pp. 109, 185-186).

Subsequent to the date of the decision of the First Fore River Case and prior to the commencement of this suit, there was no change in the operation of the Plan, or in the policy of the Shipbuilding Corporation, with respect thereto (Bill par. 18; R., p. 16; Aff. Homer, R., pp. 98-99).

The holding of the scheduled hearing and the taking of any further proceedings in connection therewith, regardless of the outcome thereof, will seriously interfere with the harmonious relations which exist between the Shipbuilding Corporation and its employees, and will cause a lowering of the efficiency of the employees at the Fore River Plant, and will result in great damage which cannot be accurately estimated (Bill par. 19; R., pp. 17-19).

These facts are established by affidavits showing that there had been disseminated among the employees of the Shipbuilding Corporation at the Fore River Plant and throughout the surrounding communities much false propaganda, and it is the opinion of the General Manager of the Plant and of leading representatives of the employees that

the holding of the scheduled hearing, and the taking of proceedings in connection therewith, will seriously damage the friendly, pleasant and harmonious relations between the Shipbuilding Corporation and its employees, and will seriously affect the morale of the employees (Aff. Gould R., pp. 92-93; MacKenzie R., pp. 108, 169; Harvey R., pp. 108, 172).

The order granting the preliminary injunction stated that it appeared

> "that the issuance of a preliminary injunction is necessary to prevent immediate and irreparable damage, for the reason that the holding of any hearing for the purpose of determining whether or not the plaintiff [the Shipbuilding Corporation] has engaged at its Fore River Plant in any so-called 'unfair labor practices' under the National Labor Relations Act, or taking any action with respect thereto, would involve expense to the plaintiff which it could not recover, absence of its officials and employees from their work, which would interfere with the operation of the plaintiff's Fore River Plant, and disturbance of harmonious relations with its employees" (R., p. 113).

Similarly, one of the conclusions of law of the District Court upon the granting of the preliminary injunction was that

> "The plaintiff [the Shipbuilding Corporation] will suffer irreparable damage of the kinds alleged in its bill of complaint if any hearing is held" (R., p. 112).

Such order granting the preliminary injunction also stated that

> "immediate, continual and irreparable loss and damage to the plaintiff [the Shipbuilding Corpora-

> tion] will result unless a preliminary injunction is granted" and

that it did not appear that the Shipbuilding Corporation had

> "a plain, adequate and complete remedy at law" (R., p. 113),

and one of the conclusions of law was to the same effect (R., 112).

Furthermore, in its opinion on the motion of the petitioners to dismiss the bill of complaint (which was denied), which opinion was delivered after the case had been thoroughly briefed, the District Court said

> "The danger threatened is immediate and great" (R., p. 123).

The Court of Appeals unanimously affirmed the District Court, and in its opinion, after quoting the description of the business of the Shipbuilding Corporation in the complaint of the Labor Board, said

> "The employees of such a business are not engaged in interstate commerce nor in a business within the jurisdiction of the Board and, if not, the Board is acting without authority and in violation of law" (R., pp. 231-232).

The Court of Appeals then went on to say:

> "On the somewhat unusual facts in this case, *viz.*, the long established plant association and the long established amicable and satisfactory relations between the plaintiff and its employees fostered by it, it might well be held that irreparable injury would be caused by an investigation calculated to disturb

> those relations and that neither plaintiff [the Shipbuilding Corporation and the employee plaintiffs in No. 182] had an adequate remedy at law. Both the Shipbuilding Company and its employees have a right that the established friendly relations between them shall not be injured without legal justification. It cannot be said that the District Judge erred in finding and ruling that the plaintiffs had no adequate remedy at law or in finding and holding that danger of irreparable injury was shown and that, considering the doubt as to the Board's jurisdiction, the plaintiffs were entitled to preliminary injunctions" (R., p. 232).

After that decision of the Court of Appeals this Court handed down its opinions in the five cases involving the Act rendered April 12, 1937, and the petitioners filed a motion for leave to file a second petition for rehearing, a first petition having already been denied prior to such decisions of this Court. In denying such motion for leave to file the second petition for rehearing the Court of Appeals said:

> "It is obvious that the business here in question as described in the finding of the District Judge is very different in character from the 'far-flung' enterprises of the Jones & Laughlin Steel Corporation, or from the essentially interstate businesses involved in *National Labor Relations Board* v. *Friedman-Harry Marks Clothing Co.* and *National Labor Relations Co.* [*sic.*] v. *Fruehauf Trailer Co.* In applying the test laid down in the Jones & Laughlin opinion to individual business organizations some uncertainty as to which are under federal control in their relations with their employees and which under state control will at first be unavoidable. When the question is raised, as in this case, we think it

devolves on the National Labor Relations Board to show that the business involved is probably within its jurisdiction. *On the findings of the District Judge that fact is not established in the present case.* We think the case should stand for final hearing in the District Court" (Italics ours) (R., p. 243).

ARGUMENT

I.

A PRELIMINARY INJUNCTION SHOULD NOT BE DISTURBED ON APPEAL EXCEPT FOR IMPROVIDENT ALLOWANCE, VIOLATION OF THE RULES OF EQUITY OR ABUSE OF DISCRETION.

One of the principles of law most thoroughly established by the decisions of this Court is that the decree of a District Court granting a preliminary injunction "will not be disturbed on appeal except for improvident allowance, violation of the rules of equity or abuse of discretion". *Rogers* v. *Hill,* 289 U. S. 582, 587 (1933); *Prendergast* v. *New York Telephone Company,* 262 U. S. 43, 50 (1923).

II.

THE DISTRICT COURT DID NOT ACT IMPROVIDENTLY, VIOLATE ANY RULE OF EQUITY OR ABUSE ITS DISCRETION.

1. The District Court Did Not Act Improvidently or Abuse Its Discretion.

As pointed out above, the District Court found that immediate, serious and irreparable damage would result

unless a preliminary injunction were granted and the Court of Appeals held that it did not err in so finding (see pp. 10-12, *supra*). We submit that this Court, following its usual practice, should not upset the concurrent findings of fact of the two lower courts.

Moreover, the courts below found that no harm could come from staying the proceedings until a final hearing and, consequently, that the balance of convenience favored the granting of the preliminary injunction* (R., pp. 111, 123).

Where there exists substantial doubt with respect to the constitutionality of the application of an act to a plaintiff and where there is likelihood that the application of such an act to such plaintiff would cause it damage and injury, and where the remedy purportedly afforded by such act is not as timely, plain, adequate or complete as the remedy which equity might afford, the question of whether or not a preliminary injunction maintaining the *status quo* should or should not be granted rests in the sound discretion of the District Court. *Ohio Oil Co.* v. *Conway*, 279 U. S., 813, 815 (1929). The District Court found, in effect, that this suit presented just such a situation and, accordingly, granted the preliminary injunction herein which was affirmed by the Court of Appeals in the decision to review which certiorari is sought.

Unless the view of the District Court is entirely without basis, unless this Court shall find that the District

*As a matter of fact, if the petitioners had proceeded in the District Court instead of taking an appeal to the Court of Appeals, or even if they had proceeded therein after the decision of the Court of Appeals, instead of bringing this petition for certiorari, this suit might well have been determined on its merits before now by the District Court.

Court, or the Court of Appeals in affirming the District Court, acted arbitrarily and abused its judicial discretion or violated some rule of equity in granting the preliminary injunction, or in affirming its issuance, this Court should deny the petition for certiorari to review the decision of the Court of Appeals.

In this situation it is obvious that the court below did not act improvidently or abuse its discretion, and the only question is whether it had any jurisdiction in the premises. We contend that it did have such jurisdiction.

2. The Labor Board Has No Jurisdiction Over Relations Between the Shipbuilding Corporation and Its Employees.

This Court in its recent decisions in the cases involving the Act expressly recognized the fact that the scope of the Act and "the grant of authority to the Board does not purport to extend to the relationship between all industrial employees and employers" and that the terms of the Act "do not impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce" and that the Act "purports to reach only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds". *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation, supra.*

As pointed out by the Court of Appeals in the above quoted excerpt from its decision (p. 12, *supra*) the business of the Shipbuilding Corporation at the Fore River Plant is very different from the businesses involved in such recent decisions of this Court.

We submit that in the light of numerous decisions of this Court, particularly those in *Carter* v. *Carter Coal Co.*, 298 U. S. 238 (1936), and *Schechter Corporation* v. *United States*, 295 U. S. 495 (1935), the National Labor Relations Act cannot be applied to the Shipbuilding Corporation at its Fore River Plant and to its relations with its employees there.

The Act is grounded solely upon the power of the Federal Government to regulate interstate commerce and was sustained by this Court as having a field of constitutional application on that ground. *The Associated Press* v. *National Labor Relations Board, supra; National Labor Relations Board* v. *Jones & Laughlin Steel Corporation, supra.* The Act cannot constitutionally be applied to the Shipbuilding Corporation, because the commerce clause of the Federal Constitution does not give to Congress the power to legislate with respect to any matters which do not constitute interstate or foreign commerce or directly or intimately affect such commerce. *Schechter Corporation* v. *United States, supra; Carter* v. *Carter Coal Co., supra; National Labor Relations Board* v. *Jones & Laughlin Steel Corporation, supra.* As this Court said in the *Jones & Laughlin* case (at p. 621 of 57 Sup. Ct.):

> "The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several states' and the internal concerns of a state. That distinction between what is national and what is local in the activities of commerce is vital to our federal system."

The outstanding, significant facts bearing upon the jurisdiction of the Labor Board in this suit are the follow-

ing: The employees involved herein are engaged solely in intrastate activities. The Shipbuilding Corporation does not ship any of its products in interstate commerce, but delivers all of them to purchasers at the Fore River Plant. The relations between the Shipbuilding Corporation and its employees at that Plant do not tend to lead to disputes burdening or obstructing interstate commerce or the free flow thereof.* It is clear that a strike or other labor trouble at the Fore River Plant would not directly affect interstate commerce and that it would have no such intimate effect upon interstate commerce as has been held by this Court to be necessary in order to give Congress jurisdiction.

There has been no labor trouble at the Fore River Plant for more than thirteen years and no trouble or strike is threatened or even suggested. The employees are satisfied with the Plan of Employees' Representation now in effect

*Regardless of the impossibility of applying the Act constitutionally to the Shipbuilding Corporation and its relations with its employees, because of the local nature of its business, the application of the provisions of the Act to the Shipbuilding Corporation sought to be made by the Labor Board in its complaint involved in this suit, by destroying the Plan and forcing a change in the now satisfactory method by which collective bargaining is conducted at the Fore River Plant, would violate the right constitutionally guaranteed to each employer, including the Shipbuilding Corporation, to contract and bargain freely with his employees, as well as the right constitutionally guaranteed to employees, including those of the Shipbuilding Corporation, to contract and bargain freely with their employers, which rights are property rights. *Adair* v. *United States*, 208 U. S. 161 (1908); *Coppage* v. *Kansas*, 236 U. S. 1 (1915); *Hitchman Coal & Coke Company* v. *Mitchell*, 245 U. S. 229 (1917); *The Virginian Railway Company* v. *System Federation No. 40, etc.*, 300 U. S. 515 (1937); *The Associated Press* v. *National Labor Relations Board, supra; National Labor Relations Board* v. *Jones & Laughlin Steel Corporation, supra; National Labor Relations Board* v. *Fruehauf Trailer Co., supra; National Labor Relations Board* v. *Friedman-Harry Marks Clothing Co., Inc., supra; Washington, Virginia & Maryland Coach Co.* v. *National Labor Relations Board, supra.*

at the Fore River Plant and desire to continue collective bargaining under it. As appears from the bill filed by employees and the findings of the District Court in their suit, the employees believe that the holding of the scheduled hearing by the Labor Board would destroy confidence in the Plan, would upset friendly relations and would lead to labor troubles and disputes (R., p. 159). There is, therefore, no basis for believing that the holding of the scheduled hearing would have anything except a bad effect upon production at the Fore River Plant and the carrying on of the activities of any other business that may be dependent upon such production.

Moreover, this suit involves the so-called unfair labor practice defined in subdivision (2) of Section 8 of the Act having to do with the formation or administration of labor organizations, or the contribution of support to them. That unfair labor practice was not involved in any of the five decisions of this Court under the Act, rendered April 12, 1937. The application of that unfair labor practice to the Shipbuilding Corporation and its relations with its employees which the Labor Board is attempting to make in the scheduled hearing and in the proceedings in connection therewith, amounts to an unconstitutional* intrusion in the now satisfactory relations between the Shipbuilding Corporation and its employees with respect to the method and manner by which they collectively bargain with each other.

3. The Damage that Would Be Suffered by the Shipbuilding Corporation Is Cognizable in Equity.

The decisions of the courts clearly establish that the situation presented by the complaint of the Labor Board

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*See cases cited in footnote, p. 17.

and the hearing scheduled thereon is one in which the equity jurisdiction of the District Court may properly be invoked to prevent damage which would be incurred by the Shipbuilding Corporation as a result of the chain of events set in motion by the scheduled hearing. *Watson* v. *Sutherland,* 5 Wall. 74 (1866); *Pierce* v. *Society of Sisters,* 268 U. S. 510 (1925); *Walla Walla* v. *Walla Walla Water Co.,* 172 U. S. 1 (1898); *Hitchman Coal & Coke Company* v. *Mitchell, supra* (1917); *Pennsylvania* v. *West Virginia,* 262 U. S. 553, 592, 593 (1923); *City Bank Farmers Trust Co.* v. *Schnader,* 291 U. S. 24, 34 (1934).

It is clear also from the decisions of the courts that the damage to the Shipbuilding Corporation which would result from the holding of the scheduled hearing and the taking of proceedings and action in connection therewith is irreparable damage and is cognizable as such in equity. Instances in which this Court has recognized as irreparable damage cognizable in equity interferences with employment relationships fundamentally the same as those being attempted by the petitioners and the Labor Board herein are *Truax* v. *Raich,* 239 U. S. 33 (1915); *Hammer* v. *Dagenhart,* 247 U. S. 251 (1918); *Terrace* v. *Thompson,* 263 U. S. 197, 215, 216 (1923); *Euclid* v. *Ambler Realty Co.,* 272 U. S. 365, 386 (1926).

4. The Remedy Afforded to the Shipbuilding Corporation by the National Labor Relations Act Is Entirely Inadequate.

The holding by the petitioners of a hearing in the name of the Labor Board, and the taking by them of proceedings in connection therewith, is imminent, and is only prevented by the existence of the preliminary injunction, and the

Shipbuilding Corporation has no remedy at law whatsoever, or at least there is no remedy at law available to the Shipbuilding Corporation which is timely, plain, adequate or complete, to prevent irreparable damage and injury which it would suffer from the holding of such hearing and the taking of such proceedings.

Under the Act the control of the proceeding is entirely in the hands of the Labor Board and its agents and agencies, until it shall issue a cease and desist order. It will be a long time (if ever) before the Shipbuilding Corporation can have the opportunity of questioning before a court (except in this suit) the jurisdiction of the Labor Board and the applicability of the Act to the Shipbuilding Corporation and its relations with its employees. In the meantime, serious and irreparable injury will result to the Shipbuilding Corporation from the disturbance of the harmonious relations which exist between it and its employees. Moreover, it may well happen that the Shipbuilding Corporation will suffer all the attendant inconvenience, damage and loss resulting from the scheduled hearing and that the Labor Board will fail to enter any order reviewable by a court. The remedy afforded by the Act is not adequate and the Shipbuilding Corporation is entitled to the relief granted by the preliminary injunction. *Boyce* v. *Grundy,* 3 Peters 210, 215 (1830); *Kilbourn* v. *Sunderland,* 130 U. S. 505, 514-515 (1889); *Walla Walla* v. *Walla Walla Water Co., supra; Fredenberg* v. *Whitney,* 240 Fed. 819, 822-823 (D. C. W. D., Wash. N. D., 1917). See also: *Davis* v. *Wakelee,* 156 U. S. 680, 688 (1895); *Ex parte Young,* 209 U. S. 123 (1908); *Hitchman Coal & Coke Co.* v. *Mitchell, supra; Union Pacific R. R. Co.* v. *Weld County,* 247 U. S. 282, 287 (1918);

Wallace v. *Hines,* 253 U. S. 66, 68 (1920); *Dawson* v. *Kentucky Distilleries Co.,* 255 U. S. 288, 296 (1920). We do not understand that the principles laid down and applied in these cases have been rejected in any of the later cases cited in the petition.

Moreover, on an appeal from an order of the Labor Board, the Act does not permit independent judicial determination of the fundamental or jurisdictional facts involved. For that reason, also, the remedy afforded by the Act is inadequate. *Crowell* v. *Benson,* 285 U. S. 22 (1932). Under the Act all findings of fact of the Labor Board are conclusive upon the Circuit Courts of Appeals in any proceeding to review any order of the Labor Board, if there should be evidence (even hearsay) to support such finding (§10(b) and (e)). A vital and fundamental question which lies at the very threshold of the proceeding of the Labor Board involved in this suit is whether or not the business of the Shipbuilding Corporation and its relations with its employees at its Fore River Plant involved in such proceeding constitute interstate or foreign commerce or directly affect such commerce or are intimately and closely related thereto. That is a jurisdictional question and is one which can only be determined with finality by a constitutional court upon the basis of a record adduced before it. Any other procedure would deprive the Shipbuilding Corporation of its liberty and property without due process of law and would prevent the courts from exercising their constitutional function. The Act attempts to do both, for it contains no provisions permitting an independent judicial determination of such fact, but it purports, as pointed out above, to make *all* findings of fact of the Labor Board conclusive upon the Circuit Courts of Appeals in proceedings

provided for by the Act, if there shall be evidence (even hearsay) to support such findings.

III.

CONCLUSION.

The petition should be denied.

Respectfully submitted,

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August 11, 1937.

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Supreme Court of the United States

OCTOBER TERM, 1937

No. 181

A. HOWARD MYERS, *et al.*,
Petitioners,

v.

BETHLEHEM SHIPBUILDING CORPORATION, LTD.,
Respondent.

RESPONDENT'S BRIEF

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Supreme Court of the United States

OCTOBER TERM, 1937

No. 181

A. HOWARD MYERS *et al.*,
Petitioners,

v.

BETHLEHEM SHIPBUILDING CORPORATION, LTD.,
Respondent.

RESPONDENT'S BRIEF

OPINIONS BELOW

The memorandum of the District Court for the District of Massachusetts upon the granting of the preliminary injunction (R. 117) is unreported. The opinion of the District Court upon the motion of the petitioners to dismiss the bill of complaint, which, as petitioners state, is not involved in this appeal, is reported in 15 F. Supp. 915 (R. 118). The opinion of the Circuit Court of Appeals for the First Circuit (R. 229) is reported in 88 F. (2d) 154 and the opinion of that Court (hereinafter called the Court of Appeals) denying the motion of the petitioners for leave to file a second petition for rehearing (R. 242) is reported in 89 F. (2d) 1000.

QUESTIONS PRESENTED

The question involved is whether the District Court abused its discretion or violated any rule of equity in granting the preliminary injunction against the holding by the petitioners of a hearing (hereinafter called the scheduled hearing) for the purpose of determining whether or not the respondent has engaged at its Fore River Plant in any so-called "unfair labor practices" as defined in Section 8 of the Act hereinafter referred to.

STATUTE AND REGULATIONS INVOLVED

The Act involved is the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; U. S. C., Sup. II, Title 29, Sec. 151 *et seq.*) which appears in the record (pp. 17-27 of the pamphlet following R. 245). The rules and regulations of the National Labor Relations Board (hereinafter called the Labor Board) which accompanied its complaint likewise appear in the record as Exhibit A-2 to the bill of complaint (R. 35-36).

STATEMENT

The respondent instituted this suit by filing a bill of complaint in equity for an injunction (and petition for a declaratory judgment) against the holding by the petitioners of the scheduled hearing upon a complaint issued by the Labor Board against the respondent, a copy of which is attached as Exhibit A-1 to the bill of complaint (R. 31), and prayed for a temporary injunction against

the holding of such hearing and the taking of any action with respect thereto (R. 25-29).

The prayer for a preliminary injunction was heard in the District Court on the sworn bill of complaint and affidavits, including those of various officials and employees of the respondent. It was stipulated in the District Court that the affidavits filed in the suit of *MacKenzie, et al.* v. *Myers, et al.* (No. 182, the record in which is printed with the record in No. 181) brought by employees of the respondent against the petitioners and heard with this suit in the District Court might also be considered in this suit (R. 112).

In the bill of complaint the respondent set forth the facts regarding the business conducted by it at the plant at which the Labor Board alleges that the respondent has been engaged in unfair labor practices (hereinafter called the Fore River Plant) and set forth the pertinent facts regarding its relations with its employees there. The Fore River Plant is the only plant involved in this suit.

The District Court, on the granting of the preliminary injunction, found all of the facts alleged in the bill of complaint (as distinguished from statements and conclusions of law) to be true (R. 111).

The Fore River Plant is a completely equipped plant for the designing and building of vessels of various kinds, sizes and descriptions, from small steel fishing trawlers to large freight and passenger steamers, transoceanic passenger liners and naval vessels of all descriptions (Bill, par. 7, R. 6; Aff. Gould, R. 88; Pratt, R. 100). It is located on Weymouth Fore River at Quincy and Braintree, Massachusetts (Bill, par. 6, R. 5; Aff. Gould, R. 87). The vessels built at the Fore River Plant are built entirely on specific

contract and are delivered to the purchasers thereof at the Fore River Plant* (Bill, pars. 7 and 8, R. 6-7). In carrying on its business of designing and building vessels at said plant, the respondent fabricates and shapes in its shops there especially for each vessel built by it at such plant practically all the materials used in the building of such vessels and also builds the boilers and main propelling machinery for each such vessel. The completed vessels bear no resemblance to the materials used in building them, and are of far greater value than such materials, the cost of such materials representing less than half of the cost of building such vessels, the increase in value being due to the manufacturing, fabricating and building operations performed by the respondent at said plant (Bill, par. 8, R. 7; Aff. Gould, R. 88-89). At the date of the bill of complaint herein about 5,000 men were employed at the Fore River Plant (Bill, par. 7, R. 6).

The bill of complaint alleges that neither the transaction of the business of the respondent at the Fore River Plant nor its relations with its employees with respect thereto constitute interstate or foreign commerce; that they do not directly affect such commerce; that they do not burden or obstruct such commerce, or the free flow thereof, or tend to lead to labor disputes burdening or obstructing such commerce, or the free flow thereof; that such transactions do not occur, or such relations exist, in the course or current of interstate or foreign commerce, nor are they

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*About 2.5% of the respondent's business at the Fore River Plant consists of manufacturing miscellaneous machine products on specific orders and performing certain metal processing operations. Such machine products and the materials processed are also delivered at the Fore River Plant to the purchasers thereof or to those for whom such materials have been processed (Bill, pars. 7-8, R. 6-7).

a part of the operations of instrumentalities of such commerce (Bill, par. 22, R. 21). The District Court has found the facts to be as so alleged (R. 111).

In March, 1923, the Plan of Employees' Representation, which is in effect at the Fore River Plant at the present time as it has been amended from time to time by the employees, was adopted. Such plan (hereinafter called the Plan) is operated entirely by the employees without any domination, interference, intimidation or coercion on the part of the respondent. Uncontradicted affidavits, both by officials of the respondent and by employees at the Fore River Plant, who are in a position to know, demonstrate the fact that the respondent has not dominated or interfered with its employees in any way at any time up to the time of the hearing in this suit (Bill, pars. 20-21, R. 19-20; Affs. Wakeman, R. 107-108; MacKenzie, R. 108, 167-168; McDermott, R. 108, 174-175).

Prior to March, 1923, when the Plan was adopted at the Fore River Plant, labor conditions had been bad. Particularly during the years from the period of the World War until the Plan went into effect, there were intermittent labor disputes and frequent strikes and walk-outs by groups of employees in various sections and departments of the Fore River Plant, with a result that the efficiency of the employees there was impaired and operations were interfered with and, in general, conditions were unsettled and operations impeded and the existence of pleasant and harmonious relations between the respondent and its employees was prevented (Aff. Gould, R. 90-91; MacKenzie, R. 108, 168; McDermott, R. 108, 173).

A very marked change took place in labor conditions among the employees at the Fore River Plant almost im-

mediately upon the adoption of the Plan and, in marked contrast to the conditions which existed at the Fore River Plant during the period just described above, there have been no labor disturbances or labor trouble of any nature whatsoever at the Fore River Plant since the adoption of the Plan. All questions concerning rates of pay, wages, hours of employment and other conditions of employment and all grievances and other questions of interest to employees have been expeditiously and satisfactorily settled from time to time through collective bargaining between the management and the Employees' Representatives elected for the purpose under the Plan by the employees at the Fore River Plant, voting in Nominations (primaries) and Elections by secret ballot. As a result of the operation of the Plan since 1923, in almost constantly increasing measure, there have existed and there now exist at the Fore River Plant pleasant, friendly and harmonious relations between the respondent and its employees (Bill, pars. 15, 19, R. 13, 17; Affs. Gould, R. 91; Hannabury, R. 108, 177, 178; Harvey, R. 171-172).

Such Employees' Representatives, who are elected for the purpose of representing the employees in collective bargaining, were elected by the votes of over 96% of the employees eligible under the Plan to vote and who were at the plant on the day of the election, and such employees represented practically all of the employees of the respondent at the Fore River Plant* (Bill, par. 21, R. 20).

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*The record shows that 96% or 97% and 97.2%, respectively, cast good ballots that were counted in March, 1935 and in March, 1936, respectively (Aff. Barker, R. 108, 179; Supp. Aff. Barker, R. 110, 188). The record does not, of course, show beyond 1936. It is a fact, however, that in March, 1937, 98% of the employees cast good ballots that were counted.

In 1934 and 1935, the predecessor of the Labor Board, in existence under Public Resolution 44—73rd Congress* (hereinafter called the Old Labor Board) conducted a proceeding instituted on the complaint of Local No. 5 of the Industrial Union of Marine and Shipbuilding Workers of America, the complaining party upon whose charge the complaint before the Labor Board involved in this suit is based (Bill, par. 16, R. 13-14; Aff. Collins, R. 102-103). The proceeding on that complaint and the decision of the Old Labor Board thereon after lengthy hearings (hereinafter called the First Fore River Case) have an important bearing upon this suit, for in such proceeding the operation of the Plan then and now in effect at the Fore River Plant and the relations between the respondent and its employees there were described at length by witnesses and were thoroughly considered. The matters involved in the First Fore River Case included the matters that are charged in the complaint of the Labor Board involved in this suit (Bill, pars. 16, 18; R. 13, 16).

On February 13, 1935, or about 4½ months after the date of the first hearing in the First Fore River Case, the Old Labor Board unanimously decided that the respondent was not guilty of the charges made against it and refused to take the action against it which had been requested by Local 5 of the Industrial Union (Bill, par. 16, R. 14).

The out-of-pocket cost to the respondent in connection with the First Fore River Case was in excess of $15,000, and the hearings in such Case consumed a total of 2,500 hours of working time of employees, foremen and leading men, and also caused the loss of many more hours in connection with and in preparation for such hearings. Such

*Act of June 19, 1934, c. 677, 48 Stat. 1183.

hearings, similarly, caused a loss of time of important officials of the Fore River Plant, particularly the Vice-President of the respondent in charge of all of its plants and also the General Manager and Assistant General Manager of the Fore River Plant, who spent by far the greater part of the month of October, 1934, in connection with such hearings (Bill, par. 17; R. 14-16; Aff. Collins, R. 102-104).

The respondent also suffered damage (more serious, in fact, than that above described) as a result of such Case in the disturbance caused to its employees and apprehension which they manifested, which resulted in the lowering of their morale and gave rise to unsettled conditions among them which impaired the efficiency of the operations of the Fore River Plant and impeded operations there (Aff. Collins, R. 103; Supp. Aff. McDermott, R. 109, 185-186).

Subsequent to the date of the decision of the First Fore River Case and prior to the commencement of this suit, there was no change in the operation of the Plan, or in the policy of the respondent with respect thereto (Bill, par. 18; R. 16; Aff. Homer, R. 98-99).

The holding of the scheduled hearing and the taking of any further proceedings in connection therewith, regardless of the outcome thereof, will seriously interfere with the harmonious relations which exist between the respondent and its employees, and will cause a lowering of the efficiency of the employees at the Fore River Plant, and will result in great damage which cannot be accurately estimated (Bill, par. 19; R. 17-19).

These facts are established by affidavits showing that there had been disseminated among the employees of the respondent at the Fore River Plant and throughout the sur-

rounding communities much false propaganda, and it is the opinion of the General Manager of the Plant and of leading representatives of the employees that the holding of the scheduled hearing, and the taking of proceedings in connection therewith, will seriously damage the friendly, pleasant and harmonious relations between the respondent and its employees, and will seriously affect the morale of the employees (Aff. Gould, R. 91-93; MacKenzie, R. 108, 169; Harvey, R. 108, 172).

The order granting the preliminary injunction stated that it appeared

> "that the issuance of a preliminary injunction is necessary to prevent immediate and irreparable damage, for the reason that the holding of any hearing for the purpose of determining whether or not the plaintiff [the Shipbuilding Corporation] has engaged at its Fore River Plant in any so-called 'unfair labor practices' under the National Labor Relations Act, or taking any action with respect thereto, would involve expense to the plaintiff which it could not recover, absence of its officials and employees from their work, which would interfere with the operation of the plaintiff's Fore River Plant, and disturbance of harmonious relations with its employees" (R. 113).

Similarly, one of the conclusions of law of the District Court upon the granting of the preliminary injunction was that

> "The plaintiff [the Shipbuilding Corporation] will suffer irreparable damage of the kinds alleged in its bill of complaint if any hearing is held" (R. 112).

Such order granting the preliminary injunction also stated that

> "immediate, continual and irreparable loss and damage to the plaintiff [the Shipbuilding Corporation] will result unless a preliminary injunction is granted"

and that it did not appear that the respondent had

> "a plain, adequate and complete remedy at law" (R. 113),

and one of the conclusions of law was to the same effect (R. 112).

Furthermore, in its opinion on the motion of the petitioners to dismiss the bill of complaint (which was denied), which opinion was delivered after the case had been thoroughly briefed, the District Court said

> "The danger threatened is immediate and great" (R. 123).

The Court of Appeals unanimously affirmed the District Court, and in its opinion, after quoting the description of the business of the respondent in the complaint of the Labor Board, said

> "The employees of such a business are not engaged in interstate commerce nor in a business within the jurisdiction of the Board and, if not, the Board is acting without authority and in violation of law" (R. 231-232).

The Court of Appeals then went on to say:

> "On the somewhat unusual facts in this case, *viz.*, the long established plant association and the long established amicable and satisfactory relations

between the plaintiff and its employees fostered by it, it might well be held that irreparable injury would be caused by an investigation calculated to disturb those relations and that neither plaintiff [the Shipbuilding Corporation and the employee plaintiffs in No. 182] had an adequate remedy at law. Both the Shipbuilding Company and its employees have a right that the established friendly relations between them shall not be injured without legal justification. It cannot be said that the District Judge erred in finding and ruling that the plaintiffs had no adequate remedy at law or in finding and holding that danger of irreparable injury was shown and that, considering the doubt as to the Board's jurisdiction, the plaintiffs were entitled to preliminary injunctions" (R. 232).

On April 12, 1937, after that decision of the Court of Appeals, this Court handed down its opinions in the five cases involving the Act, and thereafter the petitioners filed a motion for leave to file a second petition for rehearing, a first petition having already been denied prior to such decisions of this Court. In denying such motion for leave to file the second petition for rehearing the Court of Appeals said:

"It is obvious that the business here in question as described in the finding of the District Judge is very different in character from the 'far-flung' enterprises of the Jones & Laughlin Steel Corporation, or from the essentially interstate businesses involved in *National Labor Relations Board* v. *Friedman-Harry Marks Clothing Co.* and *National Labor Relations Co.* [*sic.*] v. *Fruehauf Trailer Co.* In applying the test laid down in the Jones & Laughlin opinion to individual business organizations some uncertainty as to which are under federal control

in their relations with their employees and which under state control will at first be unavoidable. When the question is raised, as in this case, we think it devolves on the National Labor Relations Board to show that the business involved is probably within its jurisdiction. *On the findings of the District Judge that fact is not established in the present case.* We think the case should stand for final hearing in the District Court" (Italics ours; R. 243).

SUMMARY OF ARGUMENT.

I. The Labor Board does not have jurisdiction over the relations between the respondent and its employees at the Fore River Plant, because the operations conducted by the respondent at said Plant are not carried on, and the products manufactured at said Plant are not sold by the respondent, in interstate or foreign commerce and the relations of the respondent with its employees at said Plant, whatever they may be, cannot obstruct or burden, or tend to obstruct or burden, such commerce and the interruption of the operations of the respondent at said Plant would not directly affect, obstruct or burden such commerce.

II. The District Court had jurisdiction to entertain this suit and to grant a temporary injunction.

1. Jurisdiction to determine the constituitonal question whether the respondent is subject to the provisions of the Act is reposed in the courts and cannot be circumvented by statutory enactment.

2. The Act does not purport to take from the District Court equitable jurisdiction to prevent irre-

parable damage that would result from the holding of hearings by the Labor Board.

3. The respondent would suffer irreparable injury from the holding by the Labor Board of the scheduled hearing, not only by reason of the direct cost to the respondent and the loss of time of its officials and employees which would result from the holding of the scheduled hearing and the actions of the petitioners in connection therewith, but also by reason of the serious injury to the good-will and harmonious relations that have heretofore existed and now exist between the respondent and its employees at the Fore River Plant and the consequent serious impairment of the efficiency of operations at said Plant that would inevitably result from the holding of the scheduled hearing.

4. The respondent has no timely, plain, adequate or complete remedy at law.

III. No proper ground exists for reversing the order granting a preliminary injunction.

1. The Court should not disturb a preliminary injunction, except for improvident allowance, violation of the rules of equity or abuse of discretion.

2. A preliminary injunction should not be disturbed by the Court where irreparable injury to the plaintiff may ensue and the continuance in effect of the injunction cannot seriously harm the defendant, unless it is clear from the record that there is no equity in the bill of complaint.

ARGUMENT

I

THE LABOR BOARD DOES NOT HAVE JURISDICTION OVER THE RELATIONS BETWEEN THE RESPONDENT AND ITS EMPLOYEES AT THE FORE RIVER PLANT.

As has been hereinbefore stated, the respondent's business at the Fore River Plant is a local business operated entirely within the State of Massachusetts. The employees employed therein are engaged solely in intrastate activities. The respondent does not ship any of its products in interstate or foreign commerce, but delivers all of them to purchasers at the Fore River Plant. Its business is not in interstate or foreign commerce and neither its operations nor its relations with its employees can directly affect such commerce. Hence neither of them is within the power of regulation granted by the Commerce Clause.

In a long line of decisions this Court has held that production is not commerce and is not within the power of Congress to regulate. *Kidd* v. *Pearson,* 128 U. S. 1; *United States* v. *Knight Company,* 156 U. S. 1; *Hammer* v. *Dagenhart,* 247 U. S. 251; *United Mine Workers* v. *Coronado Coal Co.,* 259 U. S. 344; *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245; *Oliver Iron Co.* v. *Lord,* 262 U. S. 172; *Delaware, Lackawanna & Western R. R. Co.* v. *Yurkonis,* 238 U. S. 439; *United Leather Workers* v. *Herkert,* 265 U. S. 457; *Utah Power & L. Co.* v. *Pfost,* 286 U. S. 165; *Champlin Refining Co.* v. *Commission,* 286 U. S. 210; *Chassaniol* v. *Greenwood,* 291 U. S. 584;

Schechter Corporation v. *United States*, 295 U. S. 495; *Carter* v. *Carter Coal Co.*, 298 U. S. 238.

In *Kidd* v. *Pearson*, at 128 U. S. 1, *supra*, it was contended that a statute of Iowa prohibiting the manufacture of intoxicating liquors and construed by the highest court of that state as prohibiting such manufacture for the purpose of interstate transportation, as well as for local consumption, was unconstitutional as an unwarranted interference with interstate commerce. This Court held that the Commerce Clause did not empower Congress to regulate the production of articles intended for shipment in interstate commerce, and that consequently the state act was not in contravention of that Clause. The reasons for that conclusion were stated, in part, as follows (pp. 20-21):

> "Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation. * * * If it be held that the term [commerce] includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. * * * The power being vested in Congress and denied to the States, it would follow as an inevitable result that the duty would de-

> volve on Congress to regulate all of these delicate, multiform and vital interests—interests which in their nature are and must be, local in all the details of their successful management."

In *United States* v. *Knight Company*, 156 U. S. 1, *supra*, the Court again distinguished production and commerce, and said (p. 12):

> "Commerce succeeds to manufacture, and is not a part of it."

In that case the Court also said (p. 16) that if regulation of commerce extended to the regulation of "productive industries whose ultimate result may affect external commerce, comparatively little of business operations and affairs would be left for state control."

In the first *Coronado* case (*United Mine Workers* v. *Coronado Coal Company*, 259 U. S. 344, *supra*), the Court said (p. 407):

> "Coal mining is not interstate commerce, and the power of Congress does not extend to its regulation as such. In *Hammer* v. *Dagenhart*, 247 U. S. 251, 272 we said: 'The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterward shipped or used in inter state commerce, make their production a part thereof. *Delaware, Lackawanna & Western R. R. Co.* v. *Yurkonis*, 238 U. S. 439'. Obstruction to coal mining is not a direct obstruction to interstate commerce in coal, *although it, of course, may affect it by reducing the amount of coal to be carried in that commerce.*" (Italics ours.)

In *Heisler* v. *Thomas Colliery Company*, 260 U. S. 245, the Court stated that a conception of the Commerce Clause that would bring within it the regulation of production

> "* * * would nationalize all industries, it would nationalize and withdraw from state jurisdiction and deliver to federal commercial control the fruits of California and the South, the wheat of the West and its meats, the cotton of the South, the shoes of Massachusetts and the woolen industries of other States, at the very inception of their production and growth, that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet 'on the hoof', wool yet unshorn, and coal yet unmined, because they are, in varying percentages destined for and surely to be exported to States other than those of their production." (pp. 259-260)

While the cases above cited other than the *Schechter* case and the *Carter Coal Company* case involved primarily the interpretation and application of the Sherman Act, the Court in its opinion in the *Schechter* case made it plain that the test is the same in respect of the extent of constitutional power.

In *Schechter Corporation* v. *United States*, 295 U. S. 495, the Court said concerning the contention made in that case that the petitioner's business of buying poultry that had been shipped in interstate commerce for slaughtering and for sale within the State of New York only was in the "current" or "flow" of interstate commerce (p. 543):

> "* * * The mere fact that there may be a constant flow of commodities into a State does not mean that the flow continues after the property has arrived and has become commingled with the mass of property within the state and is there held solely for local

disposition and use. So far as the poultry here in question is concerned, the flow in interstate commerce had ceased. The poultry had come to a permanent rest within the State. It was not held, used, or sold by defendants in relation to any further transactions in interstate commerce and was not destined for transportation to other states. Hence, decisions which deal with a stream of interstate commerce—where goods come to rest within a State temporarily and are later to go forward in interstate commerce—and with the regulations of transactions involved in that practical continuity of movement, are not applicable here [citing cases]."

In the *Schechter* case the Court said further (p. 546):

"In determining how far the federal government may go in controlling intrastate transactions upon the ground that they 'affect' interstate commerce, there is a necessary and well-established distinction between direct and indirect effects. The precise line can be drawn only as individual cases arise, but the distinction is clear in principle. Direct effects are illustrated by the railroad cases we have cited, as *e. g.*, the effect of failure to use prescribed safety appliances on railroads which are the highways of both interstate and intrastate commerce, injury to an employee engaged in interstate transportation by the negligence of an employee engaged in an intrastate movement, the fixing of rates for intrastate transportation which unjustly discriminate against interstate commerce. But where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power. If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would

embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the federal government. Indeed, on such a theory, even the development of the State's commercial facilities would be subject to federal control."

And at page 549:

"* * * If the federal government may determine the wages and hours of employees in the internal commerce of a State, because of their relation to cost and prices and their indirect effect upon interstate commerce, it would seem that a similar control might be exerted over other elements of cost, also affecting prices, such as the number of employees, rents, advertising, methods of doing business, etc. All the processes of production and distribution that enter into cost could likewise be controlled. If the cost of doing an intrastate business is in itself the permitted object of federal control, the extent of the regulation of cost would be a question of discretion and not of power."

And at page 550:

"* * * But the authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several States' and the internal concerns of a State. * * *"

In *Carter* v. *Carter Coal Company,* 298 U. S. 238, *supra,* the Court said (pp. 303-4):

"* * * One who produces or manufactures a commodity, subsequently sold and shipped by him in interstate commeroe, whether such sale and shipment were originally intended or not, has engaged

in two distinct and separate activities. So far as he produces or manufactures a commodity, his business is purely local. So far as he sells and ships, or contracts to sell and ship, the commodity to customers in another state, he engages in interstate commerce. In respect of the former, he is subject only to regulation by the state; in respect of the latter, to regulation only by the federal government. *Utah Power & L. Co.* v. *Pfost,* 286 U. S. 165, 182. Production is not commerce; but a step in preparation for commerce. *Chassaniol* v. *Greenwood,* 291 U. S. 584, 587.

"We have seen that the word 'commerce' is the equivalent of the phrase 'intercourse for the purposes of trade.' Plainly, the incidents leading up to and culminating in the mining of coal do not constitute such intercourse. *The employment of men, the fixing of their wages, hours of labor and working conditions, the bargaining in respect of these things —whether carried on separately or collectively— each and all constitute intercourse for the purposes of production, not of trade.* The latter is a thing apart from the relation of employer and employee, which in all producing occupations is purely local in character. Extraction of coal from the mine is the aim and the completed result of local activities. Commerce in the coal mined is not brought into being by force of these activities, but by negotiations, agreements, and circumstances entirely apart from production. Mining brings the subject matter of commerce into existence. Commerce disposes of it. (Italics ours.)

"A consideration of the foregoing, and of many cases which might be added to those already cited, renders inescapable the conclusion that the effect of the labor provisions of the act, including those in respect of minimum wages, wage agreements, col-

lective bargaining, and the Labor Board and its powers, primarily falls upon production and not upon commerce; and confirms the further resulting conclusion that production is a purely local activity. It follows that none of these essential antecedents of production constitutes a transaction in or forms any part of interstate commerce. *Schechter Corp.* v. *United States, supra,* p. 542 *et seq.* Everything which moves in interstate commerce has had a local origin. Without local production somewhere, interstate commerce, as now carried on, would practically disappear. Nevertheless, the local character of mining, of manufacturing and of crop growing is a fact, and remains a fact, whatever may be done with the products."

Again, at page 308, the Court said:

"Much stress is put upon the evils which come from the struggle between employers and employees over the matter of wages, working conditions, the right of collective bargaining, etc., and the resulting strikes, curtailment and irregularity of production and effect on prices; and it is insisted that interstate commerce is *greatly* affected thereby. But, in addition to what has just been said, the conclusive answer is that the evils are all local evils over which the federal government has no legislative control. The relation of employer and employee is a local relation. At common law, it is one of the domestic relations. The wages are paid for the doing of local work. Working conditions are obviously local conditions. The employees are not engaged in or about commerce, but exclusively in producing a commodity. And the controversies and evils, which it is the object of the act to regulate and minimize, are local

> controversies and evils affecting local work undertaken to accomplish that local result. Such effect as they may have upon commerce, however extensive it may be, is secondary and indirect. An increase in the greatness of the effect adds to its importance. It does not alter its character."

After referring to the decision in the *Schechter* case, the Court continued (p. 310):

> "A reading of the entire opinion makes clear, what we now declare, that the want of power on the part of the federal government is the same whether the wages, hours of service, and working conditions, and the bargaining about them, are related to production before interstate commerce has begun, or to sale and distribution after it has ended."

The Act itself purports to forbid only unfair labor practices "affecting commerce" (Section 10) and defines the term "affecting commerce" as meaning "in commerce or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce" (Section 2 (7)). In *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation,* 301 U. S. 1, and the other cases involving the Act that were decided at the same time as that case (*National Labor Relations Board* v. *Freuhauf Trailer Company,* 301 U. S. 49; *National Labor Relations Board* v. *Friedman-Harry Marks Clothing Co.,* 301 U. S. 58), the Court expressly recognized that the grant of authority to the Labor Board under the Act "does not purport to extend to the relationship between all industrial employees and employers" and that the Act does not "impose collective bargaining upon all

industry regardless of effects upon interstate or foreign commerce", but that it "purports to reach only what may be deemed to burden or obstruct that commerce" and that, as thus qualified, "it must be construed as contemplating the exercise of control within constitutional bounds" (301 U. S. 1, 31).

In those cases the Court held that the provisions of the Act which forbid interference by an employer with the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection as applied to the particular industries then before the Court were within the power of Congress, under the Commerce Clause. The industries considered in those cases were shown to be extensively engaged in interstate commerce both in the receipt of their raw materials and in the sale and distribution of their products. In the principal case (the *Jones & Laughlin Steel Corporation* case) the respondent was found to be the fourth largest producer of steel in the United States and the court reviewed and commented on its "far flung activities" in interstate commerce. The respondents in the others of such cases, while not comparable in size and in the extent of their interstate activities with the steel company, were likewise shown to be both dependent for their raw materials on, and extensively engaged in the distribution of their products in, interstate commerce. On the facts in those cases the majority of the Court was of the opinion that it was within the power of Congress to protect the interstate and foreign commerce there involved by appropriate means against obstruction and injury that might result from labor disturbances and the stopping of the operations of the respondents in consequence thereof.

In the majority opinion care was taken to limit the application of the decisions to the facts of the particular cases then under consideration. The challenge of the Act as an attempt to regulate all industry, thus invading the reserved powers of the states over their local concerns, was referred to and the Court in the majority opinion said:

> "If this conception of terms, intent and consequent inseparability were sound, the Act would necessarily fall by reason of the limitation upon the federal power which inheres in the constitutional grant, as well as because of the explicit reservation of the Tenth Amendment. *A. L. A. Schechter Poultry Corp.* v. *United States,* 295 U. S. 495, 549, 550, 554. The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several States' and the internal concerns of a State. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system. *Id.*" (pp. 29-30).

Again, with reference to the definition in the Act of the term "affecting commerce", it was said:

> "This definition is one of exclusion as well as inclusion. The grant of authority to the Board does not purport to extend to the relationship between all industrial employees and employers. Its terms do not impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce. It purports to reach only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds" (p. 31).

And again, with reference to the power to protect commerce from burdens and obstructions, and with citation of the *Schechter* case*, it was said:

> "Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. *Id.* The question is necessarily one of degree" (p. 37).

The decisions in the *Jones & Laughlin* case and its companion cases are clearly not applicable to the facts in this case. As has been hereinbefore shown, the District Court in this case has found the facts to be, as alleged in paragraph 22 of the Bill, that the business of the respondent at the Fore River Plant does not constitute interstate commerce and that its relations with its employees with respect thereto do not tend to lead to labor disputes burdening or obstructing such commerce or the free flow thereof (R. 111; Bill, pars. 6, 7, 8, 22; R. 5, 6, 7, 21). The Court of Appeals, by its affirmance of the order of the District Court granting the temporary injunction as well as in its opinion denying the petitioners' motion for leave to file a second petition for rehearing (R. 243), has concurred in those findings.

It is the established rule of this Court that the Court accepts findings in which two courts have concurred, unless clear error is shown. *Texas & N. O. R. Co.* v. *Railway Clerks,* 281 U. S. 548, 558; *Stuart* v. *Hayden,* 169 U. S.

**Schechter Corporation* v. *United States,* 295 U. S. 495.

1, 14; *Texas & Pacific Railway Co.* v. *Railroad Commission,* 232 U. S. 338; *Washington Securities Company* v. *United States,* 234 U. S. 76, 78; *Bodkin* v. *Edwards,* 255 U. S. 221, 223.

No such error can be shown in this case. It clearly appears from the facts as set forth in the bill and the affidavits filed on behalf of the respondent in this case that the business of the respondent at the Fore River Plant is not carried on in interstate or foreign commerce; that the products manufactured at that plant are not sold in interstate or foreign commerce; that the relations of the respondent with its employees at the Fore River Plant do not obstruct or burden, or tend to obstruct or burden, interstate or foreign commerce; and that the interruption of the operations of the respondent at the Fore River Plant would not directly affect, obstruct or burden interstate or foreign commerce. In the absence of any evidence in the record to the contrary, the District Court was warranted in accepting the facts as set forth in the bill of complaint and in such affidavits and its findings with regard thereto are fully justified.

It is submitted, therefore, that the operations of the respondent at the Fore River Plant and its relations with its employees there are not subject to regulation by Congress under the Commerce Clause and are not within the jurisdiction of the Labor Board under the Act. Any other conclusion would mean that all industry and the relations of all employers with their employees would be subject to such regulation under the Act. For instance, any other conclusion would mean that the relations between an employer engaged in the construction of a building in the City of Boston and his employees might be subject to regulation under the Act.

II

THE DISTRICT COURT HAD JURISDICTION TO ENTERTAIN THIS SUIT AND TO GRANT THE PRELIMINARY INJUNCTION.

1. Jurisdiction to Determine the Constitutional Question Whether the Respondent Is Subject to the Provisions of the Act Is Reposed in the Courts and Cannot Be Circumvented by Statutory Enactment.

This is apparent from numerous decisions of this Court, such as *Crowell* v. *Benson,* 285 U. S. 22; *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38; *Ohio Valley Water Co.* v. *Ben Avon Borough,* 253 U. S. 287, 289; *Bluefield Co.* v. *Public Service Commission,* 262 U. S. 679, 683; *Phillips* v. *Commissioner,* 283 U. S. 589, 600; *State Commission* v. *Wichita Gas Co.,* 290 U. S. 561, 569.

Crowell v. *Benson, supra,* was a suit to enjoin the enforcement of an award for personal injury made under The Longshoremen's and Harbor Workers' Compensation Act.* The statute was enacted under the admiralty and maritime jurisdiction of Congress. The application of the statute was conditioned on two fundamental limitations: (1) that the injury took place on navigable water, and (2) that the relation of employee and employer existed. The Court held that the determination of fundamental and jurisdictional facts upon which constitutional rights depend is a matter for the judicial and not the administrative side of the Government. The Court said (pp. 60, 64):

> "In cases brought to enforce constitutional rights, the judicial power of the United States

*Act of March 4, 1927, c. 509, 44 Stat. 1424; U. S. C. Title 33 §§ 901-950.

necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function."

* * * * * * *

"As the question is one of the constitutional authority of the deputy commissioner as an administrative agency, the court is under no obligation to give weight to his proceedings pending the determination of that question. If the court finds that the facts existed which gave the deputy commissioner jurisdiction to pass upon the claim for compensation, the injunction will be denied in so far as these fundamental questions are concerned; if, on the contrary, the court is satisfied that the deputy commissioner had no jurisdiction of the proceedings before him, that determination will deprive them of their effectiveness for any purpose. We think that the essential independence of the exercise of the judicial power of the United States in the enforcement of constitutional rights requires that the Federal court should determine such an issue upon its own record and the facts elicited before it."

St. Joseph Stock Yards Co. v. *United States, supra,* was a suit to enjoin enforcement of rates fixed by the Secretary of Agriculture under the Packers and Stockyards Act, 1921,* authorizing the Secretary of Agriculture to prescribe maximum charges for the services of stock yards. Concerning the right of judicial determination of the facts and the law upon which the constitutional question of deprivation of property without due process, or taking of property for public use without just compensation, depend the Court said (pp. 51-52):

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*42 Stat. 159, 7 U. S. C. §§ 181-229.

"But the Constitution fixes limits to the rate-making power by prohibiting the deprivation of property without due process of law or the taking of private property for public use without just compensation. When the legislature acts directly, its action is subject to judicial scrutiny and determination in order to prevent the transgression of these limits of power. The legislature cannot preclude that scrutiny and determination by any declaration or legislative finding. Legislative declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained. Nor can the legislature escape the constitutional limitation by authorizing its agent to make findings that the agent has kept within that limitation. Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards."

* * * * * * *

"The principle applies when rights either of person or of property are protected by constitutional restrictions. Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority."

In *State Commission* v. *Wichita Gas Co., supra,* a suit to enjoin the State Corporation Commission of Kansas from enforcing orders which were challenged as repugnant to the Federal Constitution, the Court said (p. 569):

> "The appellees were not obliged preliminarily to institute any action or proceeding in the Kansas court in order to obtain in a federal court relief from an order of the commission on the ground that it is repugnant to the Federal Constitution. *Bacon* v. *Rutland R. Co.,* 232 U. S. 134, 138. *Missouri* v. *Chicago, B. & Q. R. Co.,* 241 U. S. 533, 542. *Ex parte Young,* 209 U. S. 123, 166. And upon the issue of confiscation *vel non* they are entitled to the independent judgment of the courts as to both law and facts. *Ohio Valley Co.* v. *Ben Avon Borough,* 253 U. S. 287, 289. *Bluefield Co.* v. *Pub. Serv. Comm'n,* 262 U. S. 679, 689. *United Railways* v. *West,* 280 U. S. 234, 251."

2. The Act Does Not Purport to Take from the District Court Equity Jurisdiction to Prevent Irreparable Damage That Would Result from the Holding of Hearings by the Labor Board.

In their brief the petitioners assert that the Act vests exclusive jurisdiction in the Board and in the Circuit Courts of Appeals, and argue that the language of the Act itself deprives the District Courts of their ordinary equity power as applied to proceedings before the Board.

If the Act did so provide, it would be unconstitutional as depriving parties in the position of the respondent here of property without due process of law in violation of their rights under the Fifth Amendment. This appears

from the authorities cited under Point II. 1, *supra.* See also *Truax* v. *Corrigan,* 257 U. S. 312.

It is clear, however, that the Act does not purport to deprive the District Courts of the equity jurisdiction which they would otherwise have.

The provision in Section 10(a) of the Act to which the petitioner's brief refers gives the Board power "to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce," and then states:

> "* * * This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law or otherwise."

Obviously, the power which this paragraph states shall be exclusive is the power of the Board to prevent unfair labor practices; it has no bearing whatsoever upon the power of the District Courts to enjoin the Board from holding hearings.

The brief of the petitioner also points out that Section 10(e), which gives the Circuit Courts of Appeals power to enforce orders of the Board, provides: "The jurisdiction of the court shall be exclusive." This obviously refers only to the power to enforce orders of the Board.

The brief of the petitioner also relies upon Section 10(f). That section provides that any person aggrieved by a final order of the Board may obtain review of such order in a Circuit Court of Appeals, by filing a written petition praying that the order of the Board be modified or set aside. That section contains the following language:

> "Upon such filing, the court shall proceed in the same manner as in the case of an application by

> the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive."

Although this language is somewhat ambiguous, it seems perfectly clear that the only exclusive jurisdiction which is given to the Circuit Courts of Appeals by that section is to grant the Board temporary relief or a restraining order and, it would seem, also to modify or set aside in whole or in part the order of the Board. Clearly, it does not purport to touch the question as to whether there can be any injunction against the Board's proceeding before the Board has made an order.

3. The Respondent Would Suffer Irreparable Injury from the Holding by the Labor Board of the Scheduled Hearing.

The holding by the petitioners of the scheduled hearing and the doing of other things which the petitioners will be bound to do in connection with such hearing would inflict irreparable injury upon the respondent. In order that the extent of such injury may be understood, a consideration of the provisions of the Act and of the procedure to be anticipated under it is necessary.

A. An Outline of the Provisions of the Act Relating to the Scheduled Hearing and the Things That Will Be Done in Connection Therewith.

The Labor Board in its complaint against the respondent has charged certain violations of the Act. Pursuant to the notice attached to such complaint, the petitioners were about to proceed with the holding of a hearing thereon when they were enjoined therefrom by the restraining order and preliminary injunction herein. If the scheduled hearing shall be held, it must be anticipated that the petitioners, as agents of the Labor Board, will endeavor by every means in the conduct of such hearing to establish the charges made in such complaint and to that end will exercise all the powers which the Act and the rules and regulations of the Labor Board (R., pamphlet following p. 245) purport to confer upon them for the carrying out of the provisions of the Act. To that end it will be necessary for the petitioners to call witnesses in order to show fully the business of the respondent and its operations therein and its relations with its employees and the relations of the employees among themselves, particularly in the operation of their Plan of Employees' Representation and the relation of the respondent to it. In fact, at the time when the first restraining order herein was made the Labor Board had already issued subpoenas requiring the attendance of six witnesses in the employ of the respondent and the production of voluminous records (R. pp. 95, 105, 109, 110; Findings, R. 111). In order to defend against the charges made in the complaint officials and employees of the respondent would be required to devote a great deal of time to the hearings as well as in the preparation therefor.

Moreover, the Act (Section 11 (1)) purports to grant to the Labor Board and its agents and agencies, including the petitioners, the right at all reasonable times to "have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question". Since the Labor Board has issued its complaint against the respondent, that section purports to give to the Board, or to any of its agents or agencies, including the petitioners, the power to enter upon a fishing expedition of a most unlimited nature by examining all the papers, documents and private and confidential files of the respondent. Even though nothing therein contained may turn out to be relevant to the issues involved in such complaint, the petitioners may examine all the records of the respondent which they shall deem pertinent to their hearing, no matter how confidential such records may be and how great may be the damage that would result to the respondent from the disclosure of the information gathered by the petitioners therefrom.

B. The Adverse Effect upon the Business and Rights of the Respondent of the Scheduled Hearing and Action and Proceedings in Connection Therewith.

As hereinbefore stated (pp. 4-5) the business of the respondent at the Fore River Plant is almost entirely (all except 2½%) that of building vessels of all kinds. The Fore River Plant is necessarily a large and well equipped ship building plant and one in which the respondent has a large investment. As also hereinbefore stated, at the time of the filing of the bill of complaint herein, it had approximately 5,000 employees there.

If the scheduled hearing shall be held, the loss in respect of services of officers and employees will by no means be confined to those who shall give testimony at such hearing or give time and attention to the preparation therefor. The effect that such a proceeding would have upon the great body of employees at the Fore River Plant would involve very much greater damage to the respondent.

To the great body of employees the complaint of the Labor Board is a charge that the respondent has violated the Act to their detriment. Whatever may otherwise be their feeling towards the respondent, when it comes to a question between the respondent and their Government and law, they are sure to feel that the respondent is guilty of wrong, and, in so far as they shall take sides at all, they will take sides against the respondent. The result would be that the good will and harmonious relations that have heretofore existed and now exist between the respondent and its employees at the Fore River Plant would be seriously disturbed, and friction and even ill will against the respondent would be developed. That being the case, not only would damage be caused to the respondent in loss of time of its officers and employees from attendance at the scheduled hearings and in preparing the defense against the charge contained in the Labor Board's complaint, but the efficiency of the entire body of employees would be cut down and services that would otherwise be rendered to the respondent would be lessened (Bill pars. 12, 19; R. 9, 17; Aff. Gould, R. 91-93).

Moreover such a hearing and proceedings attendant thereon would have an adverse effect upon the general public and the good will of the general public, particularly of those with whom the respondent does business, would be affected thereby (Bill par. 12; R. 9).

The extent of the injury that will result to the respondent, if the petitioners shall be allowed to proceed with the scheduled hearing, is evidenced by the prior experience of a similar hearing that the respondent had at the Fore River Plant. In October, 1934, the National Labor Relations Board which was constituted under Public Resolution No. 44—73d Congress* (hereinafter called the Old Labor Board) conducted hearings at Boston on the complaint made by Local No. 5 of the Industrial Union of Marine and Shipbuilding Workers of America, which is the organization upon whose charges the present complaint is based. The hearings and proceedings of the Old Labor Board on such complaint in 1934 are hereinafter sometimes referred to as the First Fore River Case.

Such hearings began on October 1, 1934, and extended throughout that entire month from time to time, many of such hearings continuing until late into the evening. The last of such hearings was held on October 31, 1934. A transcript of the record in such case (including approximately 100 pages of arguments of such case at Washington before the Old Labor Board) covered approximately 1550 typewritten pages. Such hearings and the work which it was necessary to do in connection therewith and in preparation therefor placed a very substantial burden upon the respondent and constituted a real obstacle to the efficient operation of the Fore River Plant at that time (Bill, par. 17, R. 14; Aff. Collins, R. 102-104). Twenty-eight employees and officers of the respondent were called as witnesses in that case, and in addition thereto, a number of foremen and leading men employed at the Fore River Plant,

*See footnote, page 7.

as well as other employees, were required from time to time to be in attendance at such hearings (Aff. Collins, R. 102).

As a result of that proceeding and the reaction caused by it among the employees at the Fore River plant, there was a general let-down in the morale of such employees (Aff. Collins, R. 103).

As a result of the above mentioned attendance at such hearings a total of not less than 2,500 working hours of employees at the Fore River Plant were spent at such hearings and, in addition thereto, a great many working hours were spent by foremen and leading men in connection with and in preparation for such hearings. None of such hours were productive of anything. Moreover, much valuable time of various officials of the respondent charged with the supervision of the operation of the Fore River Plant, including in the case of some of them the greater part of the month of October, 1934, was spent at and in connection with such hearings and in assisting counsel for the respondent in the defense thereof to the neglect of important matters in connection with the operation of such plant (Bill, par. 17, R. 14; Aff. Collins, R. 103-104). Their time was lost to the respondent and its business thereby suffered.

After argument of the First Fore River Case before the Old Labor Board at Washington, that Board on February 13, 1935, dismissed the charges made therein. However, serious injury had been done to the respondent by the pendency of that case. The loss of time of its employees and the loss of their efficiency in its work had been suffered and a substantial amount of money (more than $15,000) was spent by the respondent in defending itself against the charges wrongfully made against it in that case (Bill, par. 17, R. 14; Aff. Collins, R. 104).

Since the adoption of the Plan of Employees' Representation in March, 1923, there have been no labor disputes or labor trouble of any nature whatsoever at the Fore River Plant. Friendly and harmonious relations have existed there between the respondent and its employees (Aff. Gould, R. 91; Hannabury, R. 108, 176; Harvey, R. 108, 171). The continuance of such relations has a distinct property value to the respondent as well as to its employees and the interruption thereof as a result of the holding of the scheduled hearing would result in loss and damage to them both.

In addition to the elements of injury above described the bill of complaint alleges that, to disprove the charge brought, "it will be necessary that it [the respondent] incur great expense for counsel fees, for fees of its witnesses, and for traveling and other expenses, all of which are irrecoverable", and that these things "will interfere with, interrupt and cause damage to the business of the plaintiff at said plant" (Bill, par. 13, R. 10).

As stated above, the District Court found all the facts alleged in the bill of complaint to be true (R. 111).

The petitioner's brief contends that the allegations of irreparable injury which we make "consist only of general assertions, entirely speculative in character, which are not sufficient to support the far-fetched claims of irreparable injury based upon them". That contention is without fundation. The apprehension which the respondent entertains is not based upon mere imagination. The actual occurrences in the First Fore River Case are a clear indication of what will inevitably happen if another similar hearing is held. The persons who are in the best position to know about the effect of such a hearing on the employees and their efficiency all agree that it will be serious and will result in great loss (see affidavits of Gould, R. 92-93; Collins, R. 102-103; MacKenzie, R. 109, 169-170; McDermott, R. 109, 174).

The District Court has not only found generally that the allegations of the bill are true, but has specifically stated that "it appears that the plaintiff will suffer irreparable damage of the kinds alleged in the bill of complaint if any hearing is held * * * or if any proceedings or action whatsoever is taken with respect thereto". (R. 112). See also the extracts from the order granting preliminary injunction and other statements of the District Court and the Circuit Court of Appeals quoted on pages 9-11, *supra*.

If the hearing stayed by the temporary injunction herein shall be permitted to proceed, the threatened injury and loss to the respondent as a result thereof will be inflicted on it, even though it shall ultimately be determined that the business of the respondent and its relations with its employees at the Fore River Plant are not subject to the provisions of the Act (Point I above). That the situation thus presented by the Labor Board's complaint and the scheduled hearing thereon is one in which the equity jurisdiction of the District Court may properly be invoked is established by the decisions of the Court. *Watson* v. *Sutherland*, 5 Wall. 74 (1866); *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925); *Walla Walla* v. *Walla Walla Water Company*, 172 U. S. 1 (1898); *Vicksburg Water Works Co.* v. *Vicksburg*, 185 U. S. 65, 82 (1902); *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229, 248 (1917); *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 592, 593 (1923); *City Bank Farmers Trust Company* v. *Schnader*, 291 U. S. 24, 34 (1934).

For instances in which the courts have recognized as irreparable damage cognizable in equity interferences with employment relationships fundamentally the same as those

being attempted by the petitioners and the Labor Board herein and in which it has been held that "if the unconstitutionality of the Act pursuant to which such interferences are attempted" is shown, "equitable relief may be had",* see *Truax* v. *Raich,* 239 U. S. 33 (1915); *Hammer* v. *Dagenhart,* 247 U. S. 251 (1918). See also *Terrace* v. *Thompson,* 263 U. S. 197, 215, 216 (1923); *Euclid* v. *Ambler Realty Co.,* 272 U. S. 365, 386 (1926).

In *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U. S. 229, *supra,* this Court said concerning the pecuniary value to an employer of the good-will of his employees (p. 252):

> "In short, plaintiff was and is entitled to the good-will of its employees, precisely as a merchant is entitled to the good will of his customers although they are under no obligation to continue to deal with him. The value of the relation lies in the reasonable probability that by properly treating its employees, and paying them fair wages, and avoiding reasonable grounds for complaint, it will be able to retain them in its employ, and to fill vacancies occurring from time to time by the employment of other men on the same terms. *The pecuniary value of such reasonable probabilities is incalculably great, and is recognized by the law in a variety of relations.*" (Italics ours.)

The Court said further (p. 256):

> "Of course, in a court of equity, when passing upon the right of injunction, damage threatened, irremediable by action at law, is equivalent to damage done."

**Truax* v. *Raich, supra,* at page 39 of 239 U. S. As we have shown in Point I above, the application of the Act to the respondent as attempted in the complaint of the Labor Board in this case is beyond the constitutional power of Congress.

In the brief of the petitioners *Chamber of Commerce of Minneapolis* v. *Federal Trade Commission,* 280 Fed. 45, is cited as authority for the contention that injury resulting from the holding of hearings by an administrative body is not such injury as will warrant intervention by a court of equity. That case did not involve an application to a court of equity for an injunction. It arose on an original petition to the Circuit Court of Appeals for a writ of certiorari to review certain interlocutory orders of the Federal Trade Commission on the ground, among others, that the statute under which the Commission proceeded was unconstitutional. Writ of certiorari was denied on the ground that the Circuit Court of Appeals was without jurisdiction to issue the writ as original process. That case did not involve any question as to the equity powers of the court. The language of the Court in that case upon which the petitioners rely is purely dictum and the decision in that case is not authority for the contention in support of which it is cited in the petitioners' brief, namely, that the injury alleged in the bill is not such as to justify intervention by a court of equity.

4. The Respondent Has No Timely, Plain, Adequate or Complete Remedy at Law.

In order that a remedy at law may be such as to oust equity of jurisdiction it must be as certain, effective, timely and complete as that which equity can give, and must be open to the party demanding relief to seek at his own choice and not at the will of the opposing party. As this Court said in *Terrace* v. *Thompson,* 263 U. S. 197, *supra* (p. 214):

> "* * * That a suit in equity does not lie where there is a plain, adequate and complete remedy at law is so well understood as not to require the citation of authorities. *But the legal remedy must be as complete, practical and efficient as that which equity could afford.*" (Italics ours.)

In *Boyce* v. *Grundy*, 3 Peters 210 (1830), Mr. Justice Johnson, in speaking of the adequacy of the remedy at law, said (p. 215):

> "* * * it must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration, as the remedy in equity."

That statement has been referred to with approval by this Court in numerous cases.

In *Kilbourn* v. *Sunderland*, 130 U. S. 505 (1889), Mr. Chief Justice Fuller said (pp. 514-515):

> "The jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would confer under the same circumstances."

In *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1, *supra*, this Court said (p. 12):

> "Where irreparable injury is threatened, or the damage be of such a nature that it cannot be adequately compensated by an action at law, or is such as, from its continuance, to occasion a constantly recurring grievance, the party is not ousted of his remedy by injunction."

See also *Davis* v. *Wakelee*, 156 U. S. 680, 688 (1895); *Ex Parte Young*, 209 U. S. 123 (1908); *Hitchman Coal*

& Coke Co. v. *Mitchell,* 245 U. S. 229, *supra; Union Pacific R. R. Co.* v. *Weld County,* 247 U. S. 282, 287 (1918); *Wallace* v. *Hines,* 253 U. S. 66, 68 (1920); *Dawson* v. *Kentucky Distilleries & Warehouse Co.,* 255 U. S. 288, 296 (1921); *Smyth* v. *Ames,* 169 U. S. 466 (1898); *Bank* v. *Stone,* 88 Fed. 383 (C. C., D. Ky., 1898); *Wheeler* v. *Bedford,* 54 Conn. 244, 7 Atl. 22 (1886).

No remedy whatever, other than that of injunction as sought in this case, is open to the respondent for the loss and injury that it will suffer from the prosecution of the proceeding begun upon the complaint of the Labor Board in this case and the holding of the scheduled hearing thereon. Not one element of such loss and damage will be recoverable at law. The only remedy open to the respondent under the Act is that of defending against a petition by the Labor Board, as provided in Section 10(e), to a Circuit Court of Appeals (or a District Court if the Circuit Courts of Appeals are in vacation) for the enforcement of the Labor Board's order, or by petitioning a Circuit Court of Appeals, as provided in Section 10(f), to modify or set aside such order. The respondent cannot have relief by either such procedure until after the Labor Board shall have completed the hearing on its complaint and made its order thereon. Long before that time arrives substantially all the injury that will result to the respondent because of the proceeding will have been suffered and for such injury there will be no remedy, notwithstanding that the court shall determine that the proceeding was without warrant or justification and not within the constitutional limits of the powers conferred by the Act upon the Labor Board.

Moreover, the statutory remedy provided in the Act is inadequate because it fails to provide for or permit inde-

pendent judicial determination of fundamental or jurisdictional facts upon which the constitutional right of the respondent to be immune from the provisions of the Act depends. *Crowell* v. *Benson,* 285 U. S. 22, *supra.*

As stated above, that case arose under the Longshoremen's and Harbor Workers' Compensation Act*. The employer sued in the District Court to enjoin the enforcement of an award made, in reliance on that Act, by a Deputy Commissioner of the United States Employees' Compensation Commission in favor of an employee against such employer. Although the facts had been found by such Deputy Commissioner pursuant to the provisions of that statute, the trial court allowed a trial *de novo* upon the jurisdictional facts. The contention of the defense was that the findings of such Deputy Commissioner as provided in such statute were conclusive as to all facts and were binding upon the court. The Supreme Court distinguished between facts which may properly be intrusted by Congress to the determination of an administrative board and questions of fact of a jurisdictional or fundamental nature upon the establishment of which rests the power of Congress to legislate in the particular field under consideration. In that connection this Court said (at pp. 54-55):

> "What has been said thus far relates to the determination of claims of employees within the purview of the Act. A different question is presented where the determinations of fact are fundamental or 'jurisdictional,' in the sense that their existence is a condition precedent to the operation of the statutory scheme. These fundamental requirements are that the injury occur upon the navigable waters of

*See footnote, p. 28.

the United States and that the relation of master and servant exist. These conditions are indispensable to the application of the statute, not only because the Congress has so provided explicitly (§ 3), but also because the power of the Congress to enact the legislation turns upon the existence of these conditions."

And again (at p. 56):

"In relation to these basic facts, the question is not the ordinary one as to the propriety of provision for administrative determinations. Nor have we simply the question of due process in relation to notice and hearing. It is rather a question of the appropriate maintenance of the Federal judicial power in requiring the observance of constitutional restrictions. *It is the question whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency—in this instance a single deputy commissioner—for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend. The recognition of the utility and convenience of administrative agencies* for the investigation and finding of facts within their proper province, and the support of their authorized action, *does not require the conclusion* that there is no limitation of their use, and that *the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the Executive Department. That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system,* wherever fundamental rights

> depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law." (Italics ours.)

The Court then reviewed the various instances in which the right to find such jurisdictional facts has been denied to an administrative agency and then said (at p. 60):

> "In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to *the independent determination of all questions, both of fact and law,* necessary to the performance of that supreme function." (Italics ours.)

This Court then went on to hold that, if the statute there involved were construed so as to deny to the District Court the right to determine *de novo* the jurisdictional facts, it would be unconstitutional. Accordingly, this Court held that the trial court had been correct in granting a trial *de novo.*

In the Act it is provided that the Labor Board shall find facts, which include the jurisdictional or fundamental facts, and that in a court to which the findings of such Board are referred they shall be conclusive, if supported by evidence (Sec. 10(e)). In this connection it should be borne in mind that in proceedings before the Labor Board "the rules of evidence prevailing in courts of law or equity shall not be controlling" (Section 10(b) of the Act). Presumably a Circuit Court of Appeals would be required to sustain the findings of the Labor Board, even if they be supported only by hearsay evidence. At any rate, under the Act the Labor Board itself assumes to find the jurisdictional or fundamental facts upon which it

bases its own jurisdiction and under that provision of the Act those facts as found are conclusive upon the court, if they are supported by evidence. *The court itself is not authorized to take any evidence or find any facts;* it merely may send any case back to the Labor Board for the purpose of having it find additional facts (Sec. 10(e)). In this respect, therefore, the Act fails to provide an adequate remedy for the respondent.

In their brief the petitioners assert that the respondents are not entitled to equitable relief until they have exhausted the administrative remedies provided in the Act, and they cite numerous cases in which they assert: "This court has held that failure to resort to the administrative process precluded invocation of 'the extraordinary powers of a court of equity'." The principles laid down in those cases are not applicable here. The only remedy which the Act purports to give the employer, in proceedings such as that which the Labor Board has instituted, is a petition to the Circuit Court of Appeals after an order to cease and desist has been entered by the Board. The Act does not contain any provision whatever for testing the jurisdiction of the Labor Board until after it has entered such an order.

None of the cases cited in the petitioners' brief deals with a situation such as that presented here. None of them supports the broad proposition that, where a statute provides for administrative proceedings for review, a party must follow them through, regardless of injury which may take place while he is doing so, and regardless of the fact that the statute can have no constitutional application to him. The principle which those cases recognize and apply is that, if there is an *adequate* administrative remedy, the

party must avail himself of it. They merely exemplify a particular application of the broader rule that equity will not grant relief where there is an adequate remedy at law. Obviously, if a party could avoid the impending consequences of administrative action by following the administrative processes of review, there would be no reason for equitable relief. In most of the cases cited the decision was reached only after it had been determined that no irreparable loss would be suffered by the party, if he were required to exhaust his administrative remedy. In some of such cases a decree of limited scope was issued by which such injury as might have resulted was obviated. In this connection, see particularly *St. Louis-San Francisco Ry. Co.* v. *Alabama Public Service Commission*, 279 U. S. 560, 563; *Porter* v. *Investors' Syndicate*, 286 U. S. 461.

One of the cases cited in this connection in the brief of the petitioners is *Federal Trade Commission* v. *Claire Furnace Co.*, 274 U. S. 160. That was a suit for an injunction against the Federal Trade Commission to enjoin it from requiring certain reports on the ground that the reports demanded called for detailed information respecting the plaintiffs' intrastate activities, as well as their activities in interstate commerce. The plaintiffs in that suit could only be compelled to furnish such reports through application by the Attorney-General to a District Court for writ of mandamus, on which application the question as to the constitutional power of the Commission to require the reports could be tried and determined by such Court. That case did not, therefore, present a situation in which, if the procedure prescribed by the statute should be followed, the plaintiff would be deprived of its right to have the constitutional question involved determined by the District Court

and it is clearly distinguishable from this case. Here, if relief in equity cannot be had, the respondent will be forced to proceed before the Labor Board without opportunity for a judicial determination of the constitutional question involved until after the injury complained of has been suffered.

The brief of the petitioners also quotes an extract from the opinion in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, *supra*, in which the Court said (p. 47):

> "We construe the procedural provisions as affording adequate opportunity to secure judicial protection against arbitrary action in accordance with the well-settled rules applicable to administrative agencies set up by Congress to aid in the enforcement of valid legislation."

That case involved an appeal from an order issued by the Board and the above-quoted statement can, therefore, refer only to judicial protection against such orders and not to judicial protection against proceedings by the Board that are entirely outside the constitutional scope of the Act.

As stated above, the issue is presented here whether the Act can, within the limits of the constitutional powers of Congress, have any application to the operations of the respondent and its relations with its employees at the Fore River Plant. If it cannot have such application, the administrative procedure prescribed by the Act does not apply and there is no administrative remedy to exhaust.

The expense and damage that must inevitably result to employers and employees from proceedings outside the constitutional scope of the Act are not, as the petitioners assert in their brief, "part of the social burden of living

under government" but is a real burden that is bound to result from unrestrained violation of the constitutional limits of government.

As this Court has pointed out in *St. Josephs Stockyards Co. v. United States, supra,*

> "* * * Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient."

Any attempt by Congress to deprive employers and employees of their right to have the issue as to whether the Labor Board can constitutionally have jurisdiction over them in any particular case determined by a court would be beyond the constitutional power of Congress. This Court has never yet held that any person may thus be exposed without redress to the tyrannies and persecutions that can result from the arbitrary conduct of administrative bodies unrestrained by the customary rules of judicial procedure and subject to all the vagaries of political pressure and bureaucracy.

III

NO PROPER GROUND EXISTS FOR REVERSING THE ORDER GRANTING THE PRELIMINARY INJUNCTION.

1. The Appellate Court Should Not Disturb a Preliminary Injunction, Except for Improvident Allowance, Violation of the Rules of Equity, or Abuse of Discretion.

In *Rogers v. Hill,* 289 U. S. 582 (1933), this Court said (pp. 586-587):

> "* * * The granting of temporary injunction involved no determination of the merits. Such a decree will not be disturbed on appeal except for improvident allowance, violation of the rules of equity or abuse of discretion."

In *Prendergast* v. *New York Telephone Company*, 262 U. S. 43 (1923), the Court said (at pp. 50-51):

> "* * * It is well settled that the granting of a temporary injunction, pending final hearing, is within the sound discretion of the trial court; and that, upon appeal, an order granting such an injunction will not be disturbed unless contrary to some rule of equity, or the result of improvident exercise of judicial discretion. *Meccano Ltd.* v. *John Wanamaker*, 253 U. S. 136, 141; *Love* v. *Atchison Railway*, *supra*, p. 331; and cases there cited. * * *"

2. A Preliminary Injunction Should Not Be Disturbed by an Appellate Court Where Irreparable Injury to the Plaintiff May Ensue and the Continuance in Effect of the Injunction Cannot Seriously Harm the Defendant, Unless It Is Entirely Clear from the Record That There Is No Equity in the Bill of Complaint.

It is also well settled that a court of equity in exercising its discretion as to the granting or withholding of a preliminary injunction has power to balance the conveniences and to grant such an injunction, if the injury which would be sustained by the defendant, should the injunction be granted, is not as great as that which would be sustained by the plaintiff, if the injunction should be refused. That principle is well settled and universally recognized. *Russell* v. *Farley*, 105 U. S. 433, 438-439 (1881); *Ohio Oil Company*

v. *Conway*, 279 U. S. 813, 815 (1929); *Prendergast* v. *New York Telephone Company*, 262 U. S. 43, 50, *supra*.

We believe that on the facts shown in this case no harm can result to any one from the continuance in effect of the preliminary injunction granted by the District Court pending a final hearing on the merits, and that a final hearing could have been had and can now be had expeditiously, if the Labor Board will cooperate to that end.

IV

CONCLUSION

The decree of the court below should be affirmed.

Respectfully submitted,

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Supreme Court of the United States.

October Term, 1937.

No. 182.

A. Howard Myers et al.,
Individually and as the National Labor Relations Board,
Petitioners,

v.

Charles MacKenzie et al.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

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Supreme Court of the United States.

OCTOBER TERM, 1937.

No. 182.

A. HOWARD MYERS ET AL., INDIVIDUALLY AND AS THE NATIONAL LABOR RELATIONS BOARD, *Petitioners*,

v.

CHARLES MacKENZIE ET AL., *Respondents*.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

1. OPINIONS BELOW.

The opinion or memorandum of the District Court for the District of Massachusetts in this suit upon the granting of a preliminary injunction (R. 222, 117) is not reported. The opinion of the District Court upon the petitioners' motion to dismiss, which is not involved in this appeal, is reported in 15 F. Supp. 915 (R. 225, 118). The opinion of the Circuit Court of Appeals for the First Circuit (R. 229) is reported in 88 F. (2d) 154. The opinion of the Circuit Court denying the petitioners' motion for leave to file a second petition for rehearing (R. 242) is not yet reported.

2. JURISDICTION.

The decree of the Circuit Court of Appeals was entered on February 12, 1937 (R. 232). A petition for rehearing by

the petitioners was denied on April 5, 1937 (R. 236), and a motion for leave to file a second petition for rehearing (R. 236) was denied on May 13, 1937 (R. 242). The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

3. Question Presented.

The question presented to this Court by the petition for writ of certiorari in this case is whether the District Court violated any rule of equity or abused its discretion in granting the preliminary injunction, the granting of which was affirmed on appeal by the Circuit Court.

4. Statute Involved.

The National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, U.S.C. Sup. II, title 29, secs. 151-166) is printed in the record (pp. 17-27 of pamphlet following R. 214). The rules and regulations made by the National Labor Relations Board are printed in the record (pp. 1-16, following R. 214).

5. Statement.

The statement of the various proceedings in this case set forth in detail in the petition for writ of certiorari will not be repeated. The allegations of fact made in the respondents' bill of complaint, as amended (R. 151), were found by the District Court to be true (R. 219, 111). These allegations will be set forth at some length in order that the facts in the case may be clearly presented to this Court.

The respondents are all employees of the Bethlehem Shipbuilding Corporation, Ltd., at the Fore River Plant of that company in Quincy and Weymouth, Massachusetts.

The respondents are respectively Chairman, Vice-Chairman and Secretary of the General Body, a group elected by and from all of the employees under a plan for the representation of employees in that plant. The respondents bring this bill of complaint in their own behalf and in their capacities as officers of the General Body in behalf of all the employees in the Fore River Plant by the authority of a vote (R. 166) of the General Body of the Representation of Employees (R. 152, paragraph 2).

The respondents and approximately five thousand (5000) other persons are employed by the Bethlehem Shipbuilding Corporation, Ltd., at the Fore River Plant under oral contracts governing their rates of pay, wages, hours of employment and working conditions. These contracts were entered into and are to be performed entirely within Massachusetts (R. 155, paragraphs 8, 9). Their occupations are wholly intrastate activities and they are not engaged in interstate commerce (R. 162, paragraph 25) or in occupations which directly burden, obstruct or affect interstate commerce (R. 162, paragraph 26). The Bethlehem Shipbuilding Corporation, Ltd., at its Fore River Plant, is engaged in designing and building vessels from raw materials. The vessels are delivered to the purchasers at the Fore River Plant (R. 155, 97).

Before the Representation of Employees Plan was adopted in 1923 there were frequent walk-outs and interruptions in employment in the Fore River Plant caused by controversies arising between the employees and the management of the Plant (R. 156, paragraph 11). Since the Representation of Employees Plan was adopted, in 1923, there has developed and there now exists harmonious relations between the employees and the management, which has resulted in continuous operation and steady employment in the Plant. Under the Representation of Employees Plan the employees nominate and elect representatives

from their number who constitute the General Body. The General Body negotiates with the management of the Bethlehem Shipbuilding Corporation, Ltd., on all questions concerning rates of pay, wages, hours of employment and working conditions. Ninety-six per cent (96%) of the employees eligible to vote participated in the last annual election. All employees eighteen (18) years of age or older who have been on the payroll for sixty (60) days prior to the election and who are not officials of the Bethlehem Shipbuilding Corporation, Ltd., or persons having the right to recommend the hiring and discharge of employees are eligible to vote (R. 155, 156, paragraphs 10, 11).

The respondents and the employees they represent are satisfied with their existing contracts of employment and desire to retain the Representation of Employees Plan now in existence without change (R. 158, paragraph 17). The holding of the proposed hearing by the National Labor Relations Board on the complaint charging the Bethehem Shipbuilding Corporation, Ltd., with unfair labor practices will discredit the Representation of Employees Plan and destroy its usefulness to the employees. This will deprive the employees of the right to negotiate by the method of their choice which has been proven by years of operation. The alteration of the Representation of Employees Plan will cause dissatisfaction and result in labor disturbances and upset production in the Plant. The Plant will close, depriving the respondents of their employment. The damage to the respondents will be irreparable (R. 159, paragraphs 18, 19, 20, 21).

6. Argument.

The question presented to this Court by the petition for writ of certiorari in this case is whether the District Court violated any rule of equity or abused its discretion

in granting the preliminary injunction. It is the contention of the respondents that the decree of the District Court granting the preliminary injunction was within its discretion and violated no rule of equity and was properly affirmed by the Circuit Court on appeal.

The District Court found the allegations of fact in the respondents' bill of complaint to be true, and granted a preliminary injunction. On appeal the Circuit Court affirmed the decree of the District Court and stated (R. 232):

> "It cannot be said that the District Judge erred in finding and ruling that the plaintiffs had no adequate remedy at law or in finding and holding that danger of irreparable injury was shown and that, considering the doubt as to the Board's jurisdiction, the plaintiffs were entitled to preliminary injunctions."

The contention of the respondents before the District Court and before the Circuit Court was that whether or not the National Labor Relations Act, *supra,* was within the power of Congress as applied to certain types of business it was not within the power of Congress under the Constitution when applied to the respondents and the Bethlehem Shipbuilding Corporation, Ltd., at its Fore River Plant. The District Court expressed grave doubts as to the constitutionality of the Act in its opinion denying the petitioners' motion to dismiss (R. 118, at 134), but did not decide that question. The District Court decided that the National Labor Relations Act was beyond the powers of Congress when applied to the respondents and the Bethlehem Shipbuilding Corporation, Ltd. Similarly the Circuit Court did not decide the question of the constitutionality of the Act, but expressed doubt as to its validity when applied to the respondents and the Bethlehem Shipbuilding Corporation, Ltd. (R. 229, at 231).

Since the decision of the Circuit Court this Court has decided that the National Labor Relations Act is within the power of Congress when applied to certain types of business.

National Labor Relations Board v. *Jones & Laughlin Steel Corp.*, No. 419, October Term, 1936.

National Labor Relations Board v. *Fruehauf Trailer Co.*, No. 420, October Term, 1936.

National Labor Relations Board v. *Friedman-Harry Marks Clothing Co.*, No. 422, October Term, 1936.

Associated Press v. *National Labor Relations Board*, No. 365, October Term, 1936.

There is, however, a limit to the constitutional application of the Act. In its opinion denying the petitioners' motion for leave to file a second petition for rehearing, the Circuit Court, after the decision of this Court upholding the validity of the Act, stated (R. 243):

> "It is obvious that the business here in question as described in the finding of the District Judge is very different in character from the 'far-flung' enterprises of the Jones & Laughlin Steel Corporation, or from the essentially interstate business involved in *National Labor Relations Board* v. *Friedman-Harry Marks Clothing Co.* and *National Labor Relations Board* v. *Freuhauf Trailer Co.* In applying the test laid down in the Jones & Laughlin opinion to individual business organizations some uncertainty as to which are under federal control in their relations with their employees and which under state control will at first be unavoidable. When the question is raised, as in this case, we think it devolves on the National Labor Relations

Board to show that the business involved is probably within its jurisdiction. On the findings of the District Judge that fact is not established in the present case. We think the case should stand for final hearing in the District Court."

It therefore is apparent that the Circuit Court, in affirming the District Court, did so on the facts found by the District Court and on its opinion that the National Labor Relations Act did not have a constitutional application to the respondents and the Bethlehem Shipbuilding Corporation, Ltd.

In none of the decisions of the Circuit Courts has a case involving a bill of complaint brought by employees been decided since the decision of this Court in *National Labor Relations Act* v. *Jones & Laughlin Steel Corporation, supra.* In the cases involving employers where a preliminary injunction was dismissed by a Circuit Court after the constitutionality of the Act had been decided by this Court, it is apparent that the nature of the business has clearly been within the jurisdiction of the Act. In these cases the Circuit Courts have omitted any consideration of jurisdiction in equity and have rested their decisions on the Act being constitutional.

General Motors Corp. v. *Bajork,* 90 F. (2d) 248.
Wilson Co. v. *Gates,* 90 F. (2d) 247.
Beman v. *Bendix Products Co.,* 89 F. (2d) 661.
Pratt v. *Oberman,* 89 F. (2d) 786.
Lyons v. *Eagle Picher Mining Co.,* 90 F. (2d) 321.
Beman v. *Iowa Mfg. Co.,* 90 F. (2d) 249.
Bowen v. *James Vernor Co.,* 89 F. (2d) 968.

In the cases of *Bowen* v. *James Vernor Co.* and *Lyons* v. *Eagle Picher Mining Co., supra,* cited by the petitioners,

it is clear from the opinion that the companies involved were engaged in the same type of business as those in the cases in this Court of *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation* and *National Labor Relations Board* v. *Fruehauf Trailer Co., supra.* These cases do not decide the question involved in the case at bar. For this reason the decisions of the other Circuit Courts handed down since the decision of this Court in *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation, supra,* on which the petitioners rely have no application to the case at bar. The District Court in this case did not base its decision on the ground that the Act was unconstitutional *in toto.*

The complaint issued by the National Labor Relations Board against the Bethlehem Shipbuilding Corporation, Ltd., in this case charged a violation of sec. 8 (2) of the National Labor Relations Act, *supra,* by dominating and interfering with the Representation of Employees. None of the cases decided by this Court involving the National Labor Relations Act, *supra,* has involved alleged violations of the particular section of the Act concerned in this case. For this reason the respondents contend the decided cases should not control the case at bar.

The respondents submit the National Labor Relations Act can have no valid application to them or to the Bethlehem Shipbuilding Corporation, Ltd., at its Fore River Plant. The District Court found as a fact that the Bethlehem Shipbuilding Corporation, Ltd., is engaged at Fore River in the fabrication of ships from raw materials and the completed vessels are delivered at the Plant to the purchaser. The decisions of this Court in *Carter* v. *Carter Coal Co.,* 298 U.S. 238 (1936), and *Schechter Corporation* v. *United States,* 295 U.S. 495 (1935), compel the conclusion that the National Labor Relations Board can have no jurisdiction over the relations between the respondents

and the Bethlehem Shipbuilding Corporation, Ltd., at Fore River.

The petitioners in their specification of errors urge that the damage alleged to be threatened in the respondents' bill of complaint is not the irreparable damage for which relief can be obtained in equity. The District Court found the alleged damage to be irreparable and this finding was affirmed by the Circuit Court (R. 230, 232). The respondents now have a method of bargaining with their employer which for a period of more than ten (10) years has proven its effectiveness. The strength of the Plan of Representation of Employees is not in the actual plan of the organization, but in its successful operation, which has inspired confidence in its fairness in both employees and employer. That confidence will inevitably be shaken by the action of the National Labor Relations Board in holding a hearing on a complaint which, although directed to the Bethlehem Shipbuilding Corporation, Ltd., is really an indictment that the Representation of Employees Plan is unfair. Whether that be true or not the respondents have a right to have the question of the jurisdiction of the National Labor Relations Board determined before any damage is done. There could be no redress for the respondents after the damage is done. The remedy provided by the National Labor Relations Act does not meet the injury threatened here.

The respondents have a right, guaranteed by the Constitution, to bargain freely with their employer. This is a property right.

Adair v. *United States,* 208 U.S. 161.

The petitioners threaten to interfere with this right and when action is taken under the National Labor Relations Act to injure this right of the respondents by applying the

Act to a situation beyond the power of Congress the District Court has jurisdiction under the general equity principles to prevent the threatened damage. This Court has affirmed the jurisdiction of a District Court to enjoin an illegal assessment of a valid tax.

Miller v. *Standard Nut Margarine Co.*, 284 U.S. 498.

The District Court found irreparable damage was threatened and that the respondents had no remedy at law which was plain, adequate and complete. It properly issued a preliminary injunction.

Terrace v. *Thompson*; 263 U.S. 197.
Truax v. *Raich*, 239 U.S. 33.
Pierce v. *Society of Sisters*, 268 U.S. 510.
Euclid v. *Ambler Realty Co.*, 272 U.S. 365.
Hitchman Coal & Coke Co. v. *Mitchell*, 245 U.S. 229.
Rickert Rice Mills v. *Fontenot*, 297 U.S. 110.

It is clear from the decided cases that the issuance of a preliminary injunction is a matter within the sound discretion of the District Court. The granting of a preliminary injunction by the District Court will not be reversed on appeal unless it appears that the District Court abused its discretion or violated some rule of equity in its issuance. Particularly is this true where the balance of injury as between the parties favors the granting of the injunction.

Prendergast v. *New York Telephone Co.*, 262 U.S. 43, 50.
Meccanon, Ltd., v. *Wanamaker*, 253 U.S. 136, 141.
Rogers v. *Hill*, 289 U.S. 582, 587.

The Circuit Court in this case fou[redacted]rict Court had not abused its discretion or viola[redacted]f equity in granting the preliminary injunctio[redacted]

7. Conclusion.

For the reasons set out above the respondents submit that the petition for writ of certiorari in this case should be denied and the District Court should be permitted on a final hearing to determine whether the nature of the respondents' occupations and the business of the Bethlehem Shipbuilding Corporation, Ltd., at its Fore River Plant are such as to come within the legitimate exercise of the powers of the National Labor Relations Board under the decisions of this Court.

Respectfully submitted,

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Supreme Court of the United States.

OCTOBER TERM, 1937.

No. 182.

A. HOWARD MYERS ET AL., *Petitioners*,

v.

CHARLES MACKENZIE ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR RESPONDENTS.

ALEXANDER G. GOULD,
Attorney for Respondents.

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Supreme Court of the United States.

October Term, 1937.

No. 182.

A. HOWARD MYERS et al., *Petitioners,*

v.

CHARLES MACKENZIE et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

BRIEF FOR RESPONDENTS.

Opinions Below.

The opinion or memorandum of the District Court for the District of Massachusetts in this suit upon the granting of a preliminary injunction (R. 222, 117) is not reported. The opinion of the District Court upon the petitioners' motion to dismiss, which is not involved in this appeal, is reported in 15 F. Supp. 915 (R. 225, 118). The opinion of the Circuit Court of Appeals for the First Circuit (R. 229) is reported in 88 F. (2d) 154. The opinion of the Circuit Court denying the petitioners' motion for leave to file a second petition for rehearing (R. 242) is reported in 89 F. (2d) 1000.

Jurisdiction.

The decree of the Circuit Court of Appeals was entered on February 12, 1937 (R. 232). A petition for rehearing by the petitioners was denied on April 5, 1937 (R. 236), and a motion for leave to file a second petition for rehearing (R. 236) was denied on May 13, 1937 (R. 243). The petition for writ of certiorari was filed herein June 30, 1937, and was granted October 11, 1937 (R. 245). The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Question Presented.

The question presented to this Court in this case is whether the District Court violated any rule of equity or abused its discretion in granting the preliminary injunction, the granting of which was affirmed on appeal by the Circuit Court.

Statute Involved.

The National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, U.S.C. Sup. II, Title 29, secs. 151-166) is printed in the record (pp. 17-27 of pamphlet following R. 214). The rules and regulations made by the National Labor Relations Board are printed in the record (pp. 1-16 of pamphlet following R. 214).

Statement.

The statement of the various proceedings in this case set forth in detail in the brief for the petitioners will not be repeated. The allegations of fact made in the respondents' bill of complaint as amended (R. 151), supported

by the affidavits filed in this suit and the affidavits filed in *A. Howard Myers et al.* v. *Bethlehem Shipbuilding Corporation, Ltd.*, No. 181 (R. 86-110, 167-181, 182-189), which it was agreed could be considered in this case (R. 190), were found to be true by the District Court (R. 219, 111). These allegations will be set forth at some length in order that the facts in this case may be clearly presented to this Court.

In April, 1936, as the result of charges made by the Industrial Union of Marine & Shipbuilding Workers of America, Local No. 5, the petitioner, A. Howard Myers, as Acting Regional Director of the First Region of the National Labor Relations Board, issued a complaint (R. 31) against the Bethlehem Shipbuilding Corporation, Ltd., charging the Bethlehem Corporation with dominating and interfering with a labor organization known as the Plan for the Representation of Employees in its Plant at Fore River, Massachusetts. The complaint charged the Bethlehem Corporation in the conduct of its business at the Fore River Plant was causing large quantities of raw materials to be shipped into Massachusetts from other states and caused the product of its Fore River Plant to be sold and transported in interstate commerce from Massachusetts to other states, and was engaging in unfair labor practices within the meaning of section 8, sub-divisions (1) and (2), and section 2, sub-divisions (6) and (7), of the National Labor Relations Act. The sections of the Act referred to are as follows:

> "Sec. 8. It shall be an unfair labor practice for an employer—
>
> "(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."
>
> ("Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organiza-

tions, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.")

"(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6(a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of pay."

"Sec. 2. When used in this Act—

. . . . . .

"(6) The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

"(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

The respondents are respectively the Chairman, Vice-Chairman and Secretary of the General Body, a group elected by and from all of the employees in the Fore River Plant of the Bethlehem Shipbuilding Corporation, Ltd., under a Plan for the Representation of Employees in the

Fore River Plant. The respondents are employees of the Bethlehem Shipbuilding Corporation, Ltd., at the Fore River Plant and bring this bill of complaint as amended (R. 152) in their own behalf and as the officers of the General Body of the Representation of Employees in the Fore River Plant by the authority of a vote of the General Body (R. 166).

The Bethlehem Shipbuilding Corporation, Ltd., at its Fore River Plant, is engaged in designing and fabricating vessels of various sizes and descriptions. Practically all of the materials used in the construction of a vessel are fabricated at the Fore River Plant, including the boilers and main propelling machinery for each vessel (R. 88, 89). The vessels are delivered to the purchaser at the Fore River Plant (R. 97). Ninety-seven and one-half per cent (97½%) of the business of the Bethlehem Corporation at the Fore River Plant is the designing and building of vessels (R. 97).

The respondents and approximately 5000 other persons are employed in the Fore River Plant, and are engaged in the designing and fabrication of vessels. This work is all performed within Massachusetts. They are employed under oral contracts which govern their rates of pay, wages, hours of employment and working conditions. These contracts were entered into in Massachusetts, and are to be performed entirely within Massachusetts (R. 155, pars. 8, 9). Their employment is a wholly intrastate activity and the employees are not engaged in interstate commerce (R. 162, par. 25) or in occupations which directly burden, obstruct or affect interstate commerce (R. 162, par. 26).

Prior to 1923 and prior to the adoption of the Plan for the Representation of Employees, there were frequent strikes and walkouts by groups of employees in various departments of the Fore River Plant which interfered with and disrupted the operation of the Plant (R. 90). In 1923

the Plan for the Representation of Employees in the Fore River Plant was adopted, with the result that since its adoption in 1923 all questions arising between the employees and the Bethlehem Shipbuilding Corporation, Ltd., in the Fore River Plant have been amicably settled without any labor disturbances or interruption in the operation of the Plant (R. 91, 156, 168, 170, 173, 176). Through the Plan for the Representation of Employees there have developed and there now exist harmonious relations between the employees and the management which have resulted in continuous operation and steady employment in the Fore River Plant (R. 156, 168, 171, 173, 177). The employees nominate and elect representatives from their number who constitute the General Body under the Plan for the Representation of Employees (R. 155). The General Body negotiates with the management of the Bethlehem Shipbuilding Corporation, Ltd., on all questions concerning rates of pay, wages, hours of employment and working conditions (R. 156). Ninety-six per cent (96%) of the employees eligible to vote participated in the last annual election (R. 174). All employees eighteen (18) years of age or older who have been on the payroll sixty (60) days prior to the election, and who are not officials of the Bethlehem Shipbuilding Corporation, Ltd., or persons having the right to recommend the hiring and discharge of employees, are eligible to vote (R. 155, 156, pars. 10, 11).

The terms of the respondents' and the other employees' contracts of employment covering rates of pay, wages, hours of employment and working conditions have been determined by negotiation through the operation of the Plan for the Representation of Employees. The respondents and the employees whom they represent are satisfied with their existing contracts of employment and desire to retain the Plan for the Representation of Employees now in existence without change (R. 138, par. 17; R. 177, 178).

The holding of the proposed hearing by the National Labor Relations Board on the complaint charging the Bethlehem Shipbuilding Corporation, Ltd., with unfair labor practices in negotiating with the employees in the Fore River Plant through the Plan for the Representation of Employees will discredit the Plan and destroy its usefulness to the employees (R. 169, 174). The employees will be deprived of their right to negotiate by the method of their choice, which has been proved by years of operation. Alteration of the Plan for the Representation of Employees will cause dissatisfaction among the employees and there will be labor disturbances. The operation of the Plant will be disrupted by labor disturbances and employment will be interrupted. The damage to the respondents will be irreparable (R. 159, pars. 18, 19, 20, 21).

Summary of Argument.

The respondents contend that the District Court violated no rule of equity and did not abuse its discretion in granting a preliminary injunction. The operation of the Fore River Plant of the Bethlehem Shipbuilding Corporation, Ltd., and the employment of the respondents in that Plant is clearly beyond the jurisdiction of the National Labor Relations Board. It is the further contention of the respondents that the allegations of fact in the bill of complaint, supported by the affidavits filed herein, state a case for equitable relief and that the respondents were threatened with irreparable damage by the holding of the proposed hearing for which there was no plain, adequate and complete remedy at law. The damage which the respondents will suffer from the holding of the hearing is such that the remedies afforded by the National Labor Relations Act are inadequate.

Argument.

I.

The National Labor Relations Board and the petitioners exceeded the authority granted them by the National Labor Relations Act in seeking to exercise jurisdiction over the Fore River Plant of the Bethlehem Shipbuilding Corporation, Ltd.

The Bethlehem Shipbuilding Corporation, Ltd., at its Fore River Plant in Quincy and Weymouth, Massachusetts, is engaged in the design and construction of vessels of various sizes and descriptions. The materials used in the construction of the vessels are cut, shaped and in other ways processed at the Plant to become component parts of the vessels. The completed vessels are delivered to the purchasers at Fore River and by them taken to their destination. The respondents and some five thousand other persons are employed at the Fore River Plant. They are engaged in the operation of the Plant and perform all their duties there. The contracts of employment are made and performed within the Commonwealth of Massachusetts.

The jurisdiction of the National Labor Relations Board is defined by the National Labor Relations Act, the provisions of which pertinent to the jurisdiction of the Board in this case are as follows:

> "Sec. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise."

"Commerce" and "affecting commerce" are defined by the Act as follows:

"Sec. 2. When used in this Act—

. . . . . .

"(6) The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory or the District of Columbia, or within the District of Columbia or any Territory or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

"(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

This Court has decided that the National Labor Relations Act can be construed so as to operate within the sphere of constitutional authority and is a valid exercise of the powers of Congress under the Constitution. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1; *National Labor Relations Board* v. *Fruehauf Trailer Co.*, 301 U.S. 49; *National Labor Relations Board* v. *Friedman-Harry Marks Clothing Co.*, 301 U.S. 58; *Associated Press* v. *National Labor Relations Board*, 301 U.S. 103; *Washington, Virginia & Maryland Coach Co.* v. *National Labor Relations Board*, 301 U.S. 142.

There can be no question that in the National Labor Relations Act Congress has sought to extend the exercise of its power under the Constitution farther than ever before. This Court has recognized the extension of this exercise of power in the above cases. That there is a very real limit to the exercise of the power of Congress under the National Labor Relations Act was recognized by this Court in its

opinion in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp., supra.* This Court did not there attempt to define that limit. It said, on page 30:

> "The authority of the Federal Government may not be pushed to such an extreme as to destroy the distinction which the commerce clause itself establishes, between commerce 'among the several States' and the internal concerns of a State. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our Federal system."

The principles governing the determination of whether in a particular instance the application of the National Labor Relations Act would be within the power of Congress were stated by this Court on page 37 of the same opinion:

> "Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control. Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. The question is necessarily one of degree."

An examination of the operations of the companies over which this Court has decided the National Labor

Relations Board has jurisdiction and to which the National Labor Relations Act may be applied as a constitutional exercise of the power of Congress will assist in determining whether the operation of the Fore River Plant of the Bethlehem Shipbuilding Corporation, Ltd., is such as to bring it within the jurisdiction of the National Labor Relations Board. In *Associated Press* v. *National Labor Relations Board, supra,* the Associated Press in gathering and distributing news between the states was actively engaged in interstate commerce. In *Washington, Virginia & Maryland Coach Co.* v. *National Labor Relations Board, supra,* the company was an instrumentality of interstate commerce transporting passengers and express for hire between the District of Columbia and the State of Virginia. In *National Labor Relations Board* v. *Friedman-Harry Marks Clothing Co., supra,* the company purchased cloth and materials from outside the state and manufactured men's clothing which was sold to customers outside the state. Similarly the company involved in the case of *National Labor Relations Board* v. *Fruehauf Trailer Co., supra,* was engaged in the manufacture of trailers, the materials for which came from outside the state. The company maintained sales offices in several states and shipped a large proportion of the trailers to customers in other states. The Jones & Laughlin Steel Corporation as described in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp., supra,* manufactures and sells steel and iron. It and its subsidiaries constitute an integrated enterprise extending into many states, operating its own mines, railroad line and finishing plants.

The Fore River Plant of the Bethlehem Shipbuilding Corporation, Ltd., in its operation is unlike any of the above-described companies. From raw materials the completed vessels are fabricated at Fore River and are delivered to the purchasers at Fore River. In the cases which

this Court has held the National Labor Relations Act to apply, the company involved has been either actually engaged in interstate commerce or its operations have involved the use of materials from outside the state and the sale or delivery of the finished product outside the state. The record in this case discloses nothing which shows there are any interstate transactions in the operations of the Fore River Plant. Even to hold that the National Labor Relations Act may be applied to companies selling and delivering their products within the state would extend the power of Congress to almost every factory or company engaged in manufacturing in the United States. The only effect on interstate commerce which the cessation of operation of such a company caused by a labor disturbance might have would be, to the extent that the company might make use of materials coming from outside the state, to diminish or retard the transportation of such materials into the state. If the operation of such companies is held to have such a close and substantial relation to interstate commerce that their control by Congress is essential to protect that commerce, then the operations of every retail store in the country which might sell merchandise coming from outside the state must, by the same principles, be within the control of Congress. Whether the company employs five or five thousand, the result must be the same. The principle is the same.

The respondents contend, therefore, that under no constitutional extension of the power of Congress can the National Labor Relations Act apply to the Bethlehem Shipbuilding Corporation, Ltd., at its Fore River Plant. The National Labor Relations Board in issuing the complaint in this case was clearly exceeding its powers and authority. The Circuit Court in its opinion on the petitioners' motion for leave to file a petition for rehearing in this case (R. 243) said:

"It is obvious that the business here in question as described in the finding of the District Judge is very different in character from the "far flung" enterprises of the Jones & Laughlin Steel Corporation or from the essentially interstate businesses involved in National Labor Relations Board v. Friedman-Harry Marks Clothing Co. and National Labor Relations Co. v. Fruehauf Trailer Co. In applying the test laid down in the Jones & Laughlin opinion to individual business organizations some uncertainty as to which are under Federal control in their relations with their employees and which under state control will at first be unavoidable. When the question is raised, as in this case, we think it devolves on the National Labor Relations Board to show that the business involved is probably within its jurisdiction. On the findings of the District Judge, that fact is not established in the present case."

II.

The District Court had jurisdiction in equity to issue a preliminary injunction.

The respondents are all employees of the Bethlehem Shipbuilding Corporation, Ltd., at the Fore River Plant. They are the Chairman, Vice-Chairman and Secretary of the General Body of the Representation of Employees in the Fore River Plant. They are the representatives elected by the employees in the Plant for the purpose of negotiating with the management of the Plant in all controversies concerning rates of pay, wages, hours of employment and working conditions. The respondents represent the approximately five thousand employees in the Fore River Plant and bring this bill of complaint under the authority of a vote of the General Body.

The Plan for the Representation of Employees was adopted in 1923, and since its adoption all controversies arising between the employees and the management in the Fore River Plant have been successfully adjusted through the operation of the Plan. There has been no cessation of either employment or operation of the Plant resulting from a failure of the employees and the management to amicably reach a satisfactory agreement on any controversy which has arisen in the Plant since 1923.

The complaint issued by the National Labor Relations Board and the petitioners herein charges the Bethlehem Shipbuilding Corporation, Ltd., at the Fore River Plant, is engaging in certain unfair labor practices as defined by the Act and is dominating and interfering with the Plan for the Representation of Employees. The complaint further alleges the business of the Fore River Plant constitutes a continuous flow of trade, traffic and commerce among the several states and is therefore under the jurisdiction of the National Labor Relations Board.

The complaint, although nominally directed against the Bethlehem Corporation, is in reality an indictment by the National Labor Relations Board of the Plan for the Representation of Employees. The respondents and the employees in the Fore River Plant believe that the Plan for the Representation of Employees provides a satisfactory and successful means of negotiating with the management. This belief is based on many years of successful operation of the Plan during which they have had continuous employment uninterrupted by labor disputes. Their present contracts of employment are satisfactory and the terms of these contracts involving rates of pay, wages, hours of employment and working conditions have been obtained through the operation of the Plan. They know from experience that the Plan will enable them to successfully negotiate any controversies which may arise. They do not

want the Plan changed, because it represents the method of negotiation of their own choice.

If the petitioners hold the proposed hearing on the complaint which they have issued, the Plan for the Representation of Employees in effect will be placed on trial and the charge that the Plan is unfair to the employees will inevitably raise questions and doubts in the minds of the employees as to whether the Plan is fair and whether the Board will permit the Bethlehem Shipbuilding Corporation, Ltd., to negotiate with the employees through the Plan. The effectiveness of any method of negotiation between employees and management must depend upon the confidence of the employees and the management that the Plan is fair and will operate successfully. This confidence now exists. The holding of the hearing will destroy the confidence which years of practical application has developed. The employees will be deprived of the benefit and advantage they now enjoy from the Plan.

If the Plan ceases to be an effective means of negotiating the settlement of controversies which arise, the employees will be faced with the same conditions which existed before the adoption of the Plan in 1923. Unsettled controversies will lead to interruption of the operations in parts of the Plant which will affect the operations and employment in other parts of the Plant. The damage threatened to the respondents will be irreparable. The charges which caused the issuance of the complaint were not made in response to any request by the employees or by any organization with which the employees are affiliated. This fact was considered by the District Court in making its decision (R. 123).

Under section 10 (b) of the Act the respondents may be allowed to intervene in any proceeding brought by the Board, but this is entirely a matter of discretion with the Board or its agents. The respondents as a matter of right

cannot participate in any hearing the Board may hold on the complaint. Whether they may or may not participate under this section of the Act is purely discretionary with the Board.

The Act provides that any person aggrieved by the final order of the Board may obtain a review of the orders by the Circuit Court of Appeals. See section 10 (f). The damage threatened to the respondents will have become an accomplished fact before they can assert any right to have the order of the Board reviewed by the Circuit Court. The Act does not permit the review by the Circuit Court of the decision of the Board as to its jurisdiction before the Board completes the hearing on the complaint. In no way under the Act may the question of the jurisdiction of the Board be raised until after the Board has completed the hearings on the complaint and made its order. The damage threatened to the respondents will result from the holding of the hearing. The remedy which the Act affords the respondents can be exercised only after the hearing on the complaint has been completed. There is, therefore, no remedy available to the respondents under the Act which will be plain, adequate or complete.

The District Court found the allegations of fact in the respondents' bill of complaint to be true. It expressed grave doubts as to the constitutionality of the National Labor Relations Act but did not decide that question. The Act has since been held constitutional by this Court, but there are definite limits to its constitutional application. The grave doubts expressed by the District Court must still exist as to the constitutional application of the Act to the Fore River Plant of the Bethlehem Shipbuilding Corporation, Ltd. The damage threatened to the respondents as alleged in the bill of complaint is real and substantial. The remedy of the respondents under the Act is of no value to the respondents. Faced with damage which is ir-

reparable, their only remedy is a resort to the equity powers of the District Court to prevent the holding of the hearing until a court can determine on all the evidence whether the National Labor Relations Board and these petitioners have any authority under the National Labor Relations Act and within the power of Congress under the Constitution to issue a complaint against the Bethlehem Shipbuilding Corporation, Ltd., and to hold a hearing on such a complaint.

The respondents submit they have a right to contest the jurisdiction of the Board before the hearing on the complaint. As was said by this Court in *Borax Consolidated* v. *City of Los Angeles*, 296 U.S. 10, 18:

> "Petitioners' argument in substance is that while the United States was powerless as against the State to pass title to tidelands in the absence of a survey, the question whether or not the land was tideland would be foreclosed by a departmental survey, although erroneous. This contention encounters the principle that the question of jurisdiction, that is, of the competency of the Department to act upon the subject matter, is always one for judicial determination."

This Court has recognized that Congress, in delegating powers to an administrative body, cannot deprive the United States Courts of the power to determine the facts upon which the administrative body predicates its jurisdiction. The right to have the question of the jurisdiction of an administrative body decided by a judicial tribunal cannot be taken away by Congress. *Crowell* v. *Benson*, 285 U.S. 22. The petitioners contend that right is preserved in the National Labor Relations Act by section 10 (f). The respondents submit that where the holding of the hearing threatens irreparable damage in a case where the Board has no jurisdiction, as in the case at bar, the District Court

has jurisdiction in equity to restrain the holding of the hearing until the question of the jurisdiction of the Board may be determined.

There is jurisdiction in equity to enjoin the enforcement of an unconstitutional law where immediate and irreparable injury is threatened and there is no plain, adequate or complete remedy at law. This has been frequently recognized in the case of unconstitutional state statutes. *Terrace* v. *Thompson,* 263 U.S. 197; *Truax* v. *Raich,* 239 U.S. 33; *Pierce* v. *Society of Sisters,* 268 U.S. 510; *Euclid* v. *Ambler Realty Co.,* 272 U.S. 365. The power of the District Court to enjoin the collection of an illegal assessment of a tax has been recognized. *Miller* v. *Standard Nut Margarine Co.,* 284 U.S. 498. A District Court may enjoin the collection of an illegal tax. *Richert Rice Mills* v. *Fontenot,* 297 U.S. 110.

It is clear that the balance of injury should be considered in connection with the issuance of the temporary injunction in this case. *Prendergast* v. *New York Telephone Co.,* 262 U.S. 43, 50. If the balance of injury to the respondents and the petitioners resulting from the granting or denial of a temporary injunction is to be considered, certainly that balance must be decided in favor of the respondents and the granting of the temporary injunction. The petitioners will suffer no injury from having the question of the jurisdiction of the National Labor Relations Board determined before a hearing is held on the complaint. If the Court shall decide the petitioners had no jurisdiction, much time and expense will be saved by the petitioners and the respondents. If the Court shall decide the Board has jurisdiction, no time or expense will have been wasted, because the Board would have to hear evidence on the question of jurisdiction which would undoubtedly be the same evidence presented to the Court.

III.

The granting of the temporary injunction should not be disturbed on appeal unless it is contrary to some rule of equity or is the result of an improvident exercise of judicial discretion.

The issuance of a preliminary injunction is within the discretion of the District Court. On appeal the issuance of a temporary injunction by a District Court will not be disturbed unless the District Court in granting the temporary injunction abused this discretion or violated some rule of equity. *Prendergast* v. *New York Telephone Co., supra; Meccano, Ltd.*, v. *Wanamaker*, 253 U.S. 136; *Rogers* v. *Hill*, 289 U.S. 582, 587. The respondents contend the District Court in this case did not violate any rule of equity or abuse its discretion in issuing the temporary injunction. The Circuit Court in sustaining the District Court has so held.

Conclusion.

The respondents submit that the decree of the Circuit Court should be affirmed.

Respectfully submitted,

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Of Counsel.

SUPREME COURT OF THE UNITED STATES.

Nos. 181 and 182.—October Term, 1937.

181 A. Howard Myers, et al., Petitioners, *vs.* Bethlehem Shipbuilding Corporation, Ltd.

182 A. Howard Myers, et al., Petitioners, *vs.* Charles MacKenzie, et al.

On Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[January 31, 1938.]

Mr. Justice Brandeis delivered the opinion of the Court.

The question for decision is whether a federal district court has equity jurisdiction to enjoin the National Labor Relations Board from holding a hearing upon a complaint filed by it against an employer alleged to be engaged in unfair labor practices prohibited by National Labor Relations Act, July 5, 1935, c. 372, 49 Stat. 449. The Circuit Court of Appeals for the First Circuit held in these cases that the District Court possesses such jurisdiction; and granted preliminary injunctions. Every other Circuit Court of Appeals in which the question has arisen has held the contrary.[1] Because of the importance of the questions presented, the conflict in the lower courts and alleged conflict with our own decisions, we granted these writs of certiorari (302 U. S. —).

The declared purpose of the National Labor Relations Act is to diminish the causes of labor disputes burdening and obstructing interstate and foreign commerce; and its provisions are applicable only to such commerce. In order to protect it the Act seeks to promote collective bargaining; confers upon employees engaged in such commerce the right to form, and join in, labor organizations; defines

[1] E. I. Dupont de Nemours & Co. *v.* Boland, 85 F. (2d) 12 (C. C. A. 2); Newport News Shipbuilding & Dry Dock Co. *v.* Schauffler, 91 F. (2d) 730 (C. C. A. 4); Bradley Lumber Co. *v.* National Labor Relations Board, 84 F. (2d) 97 (C. C. A. 5); Clark *v.* Lindemann & Hoverson Co., 88 F. (2d) 59 (C. C. A. 7); Pratt *v.* Oberman & Co., Inc., 89 F. (2d) 786 (C. C. A. 8); Heller Bros. Co. *v.* Lind, 86 F. (2d) 862 (App. D. C.); compare Bowen *v.* James Vernor Co., 89 F. (2d) 968 (C. C. A. 6); Carlisle Lumber Co. *v.* Hope, 83 F. (2d) 92 (C. C. A. 9); Lyons *v.* Eagle-Picher Lead Co., 90 F. (2d) 321 (C. C. A. 10).

acts of an employer which shall be deemed unfair labor practice; and confers upon the Board certain limited powers with a view to preventing such practices. If a charge is made to the Board that a person "has engaged in or is engaging in any . . . unfair labor practice", and it appears that a proceeding in respect thereto should be instituted, a complaint stating the charge is to be filed, and a hearing is to be held thereon upon notice to the person complained of.

The Industrial Union of Marine and Shipbuilding Workers of America, Local No. 5, made to the Board a charge that the Bethlehem Shipbuilding Corporation, Ltd.,[2] was engaging in unfair labor practices at its plant in Quincy, Massachusetts, for the production, sale and distribution of boats, ships, and marine equipment. Upon that charge the Board filed, on April 13, 1936, a complaint which alleged, among other things, that the company dominates and interferes in the manner described "with a labor organization known as Plan of Representation of Employees in Plants of the Bethlehem Shipbuilding Corporation, Ltd."; that such action leads to strikes interfering with interstate commerce; and that "the aforesaid acts of respondent constitute unfair labor practices affecting commerce, within the meaning of Section 8, subdivisions (1) and (2) and Section 2, subdivisions (6) and (7) of said [National Labor Relations] Act."

The complaint alleged, specifically:

"The respondent in the course and conduct of its business causes and has continuously caused large quantities of the raw materials used in the production of its boats, ships and marine equipment to be purchased and transported in interstate commerce from and through states of the United States other than the State of Massachusetts to the Fore River Plant in the State of Massachusetts, and causes and has continuously caused the boats, ships and marine equipment produced by it to be sold and transported in interstate commerce from the Fore River Plant in the State of Massachusetts to, into and through states of the United States other than the State of Massachusetts, all of the aforesaid constituting a continuous flow of trade, traffic and commerce among the several states."

The Board duly notified the Corporation that a hearing on the complaint would be held on April 27, 1936, at Boston, Massachu-

[2] A Delaware corporation, with its principal place of business at Bethlehem, Pennsylvania.

setts, in accordance with Rules and Regulations of the Board, a copy of which was annexed to the notice; and that the Corporation "will have the right to appear, in person or otherwise, and give testimony."

On that day the Corporation filed, in the federal court for Massachusetts, the bill in equity, herein numbered 181, against A. Howard Myers, Acting Regional Director for the First Region, National Labor Relations Board, Edmund J. Blake, its Regional Attorney for the First Region, and Daniel M. Lyons, Trial Examiner, to enjoin them from holding "a hearing for the purpose of determining whether or not the plaintiff has engaged at its Fore River Plant in any so-called unfair labor practices under the National Labor Relations Act, and from having any proceedings or taking any action whatsoever, at any time or times, with respect thereto." There were prayers for a restraining order, an interlocutory injunction and a permanent injunction; and, also, a prayer that the court declare that the National Labor Relations Act and "defendants' actions and proposed actions thereunder" violate the Federal Constitution.

On May 4, 1936, another bill in equity, herein numbered 182, against the same defendants, seeking, on largely the same allegations of fact, substantially the same relief, was brought in the same court by Charles MacKenzie, James E. Manning and Thomas E. Barker, employees of the Bethlehem Corporation and officers of the so-called Plan of Representation at the Fore River Plant.[3]

Upon the filing of each bill, the District Court issued a restraining order and an order of notice to show cause why a preliminary injunction should not issue. In each case the defendants filed a motion to dismiss the bill of complaint and also a return to the order to show cause. The cases were heard together. In each, the District Court issued the preliminary injunction; and the decrees therefor are still in effect. They were affirmed by the Circuit Court of Appeals for the First Circuit on February 12, 1937. 88 F. (2d) 154. Petitions for a rehearing, based upon the conflict with the decisions of other circuit courts of appeals were denied. And the court denied also motions for leave to file a second petition for rehearing, based upon the decisions of this Court in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, and other cases rendered April 12, 1937. 89 F. (2d) 1000. The District Court,

[3] A substituted bill of complaint was filed May 7, 1936.

denied the motions to dismiss the bills. 15 F. Supp. 915. But the review by the Circuit Court of Appeals dealt only with the decrees for a preliminary injunction.

The two cases present, in the main, the same questions. In discussing them reference will be made, in the first instance, only to the suit brought by the Corporation.

We are of opinion that the District Court was without power to enjoin the Board from holding the hearings.

First. There is no claim by the Corporation that the statutory provisions and the rules of procedure prescribed for such hearings are illegal; or that the Corporation was not accorded ample opportunity to answer the complaint of the Board; or that opportunity to introduce evidence on the allegations made will be denied. The claim is that the provisions of the Act are not applicable to the Corporation's business at the Fore River Plant, because the operations conducted there are not carried on, and the products manufactured are not sold, in interstate or foreign commerce; that, therefore, the Corporation's relations with its employees at the plant cannot burden or interfere with such commerce; that hearings would, at best, be futile; and that the holding of them would result in irreparable damage to the Corporation, not only by reason of their direct cost and the loss of time of its officials and employees, but also because the hearings would cause serious impairment of the good will and harmonious relations existing between the Corporation and its employees, and thus seriously impair the efficiency of its operations.[4]

Second. The District Court is without jurisdiction to enjoin hearings because the power "to prevent any person from engaging in any unfair practice affecting commerce", has been vested by Congress in the Board and the Circuit Court of Appeals, and Congress has declared: "This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise."[5]

[4] It is alleged that in 1934 and 1935 the predecessor of the present National Labor Relations Board instituted somewhat similar action against the Corporation. Although the proceedings were eventually dismissed, the hearings consumed a total of some 2500 hours of working time of officials and employees and cost the Corporation more than $15,000, none of which could be recovered.

[5] Compare House Committee Report, H. R. Rep. 1147, 74th Cong., 1st Sess., p. 24: "any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may claim a review of such order in the appropriate circuit court of appeals, or in the Court of Appeals

The grant of that exclusive power is constitutional, because the Act provided for appropriate procedure before the Board and in the review by the Circuit Court of Appeals an adequate opportunity to secure judicial protection against possible illegal action on the part of the Board. No power to enforce an order is conferred upon the Board. To secure enforcement, the Board must apply to a Circuit Court of Appeals for its affirmance. And until the Board's order has been affirmed by the appropriate Circuit Court of Appeals, no penalty accrues for disobeying it. The independent right to apply to a Circuit Court of Appeals to have an order set aside is conferred upon any party aggrieved by the proceeding before the Board. The Board is even without power to enforce obedience to its subpoena to testify or to produce written evidence. To enforce obedience it must apply to a District Court; and to such an application appropriate defence may be made.[6]

As was said in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 46, 47, the procedural provisions,

"do not offend against the constitutional requirements governing the creation and action of administrative bodies. See Interstate Commerce Commission *v.* Louisville & Nashville R. Co., 227 U. S. 88, 91. The Act establishes standards to which the Board must conform. There must be complaint, notice and hearing. The Board must receive evidence and make findings. The findings as to the facts are to be conclusive, but only if supported by evidence. The order of the Board is subject to review by the designated court, and only when sustained by the court may the order be enforced. Upon that review all questions of the jurisdiction of the Board and the regularity of its proceedings, all questions of constitutional right or statutory authority, are open to examination by the court. We construe the procedural provisions as affording adequate opportunity to secure judicial protection against arbitrary action in accordance with the well settled rules applicable to administrative agencies set up by Congress to aid in the enforcement of valid legislation."

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of the District of Columbia. It is intended here to give the party aggrieved a full, expeditious, and exclusive method of review in one proceeding after a final order is made. Until such final order is made the party is not injured, and cannot be heard to complain, as has been held in cases under the Federal Trade Commission Act."

[6]See Section 11 of the Act and Article II, Sections 20 and 21, of the Rules and Regulations issued April 27, 1936. Compare Federal Trade Commission *v.* Claire Furnace Co., 274 U. S. 160; E. I. Dupont de Nemours & Co. *v.* Boland, 85 F. (2d) 12 (C. C. A. 2).

It is true that the Board has jurisdiction only if the complaint concerns interstate or foreign commerce. Unless the Board finds that it does, the complaint must be dismissed. And if it finds that interstate or foreign commerce is involved, but the Circuit Court of Appeals concludes that such finding was without adequate evidence to support it, or otherwise contrary to law, the Board's petition to enforce it will be dismissed, or the employer's petition to have it set aside will be granted.[7] Since the procedure before the Board is appropriate and the judicial review so provided is adequate, Congress had power to vest exclusive jurisdiction in the Board and the Circuit Court of Appeals. *Anniston Manufacturing Co.* v. *Davis*, 301 U. S. 337, 343-346.

Third. The Corporation contends that, since it denies that interstate or foreign commerce is involved and claims that a hearing would subject it to irreparable damage, rights guaranteed by the Federal Constitution will be denied unless it be held that the District Court has jurisdiction to enjoin the holding of a hearing by the Board.[8] So to hold would, as the Government insists, in effect substitute the District Court for the Board as the tribunal to hear and determine what Congress declared the Board exclusively should hear and determine in the first instance. The contention is at war with the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.[9] That rule has been repeatedly acted on in cases where, as here, the con-

[7] Section 10 (f) of the Act provides: "Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive."

[8] In support of that contention the following cases were cited: Ohio Valley Water Co. *v.* Ben Avon Borough, 253 U. S. 287, 289; Bluefield Co. *v.* Public Service Commission, 262 U. S. 679, 683; Phillips *v.* Commissioner, 283 U. S. 589, 600; Crowell *v.* Benson, 285 U. S. 22, 60, 64; State Corporation Commission *v.* Wichita Gas Co., 290 U. S. 561, 569; St. Joseph Stock Yards Co. *v.* United States, 298 U. S. 38, 51-52.

[9] The rule has been most frequently applied in equity where relief by injunction was sought. Pittsburgh &c. Ry. *v.* Board of Public Works, 172 U. S. 32, 44-45; Prentis *v.* Atlantic Coast Line Co., 211 U. S. 210, 230; Dalton Adding Machine Co. *v.* State Corporation Commission, 236 U. S. 699, 701; Gorham Mfg. Co. *v.* State Tax Commission, 266 U. S. 265, 269-70; Federal Trade Commission *v.* Claire Furnace Co., 274 U. S. 160, 174; Lawrence *v.* St. Louis-San Francisco Ry. Co., 274 U. S. 588, 592-93; Chicago, M., St. P.

tention is made that the administrative body lacked power over the subject matter.[10]

Obviously, the rule requiring exhaustion of the administrative remedy cannot be circumvented by asserting that the charge on which the complaint rests is groundless and that the mere holding of the prescribed administrative hearing would result in irreparable damage.[11] Lawsuits also often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact.

Fourth. The Circuit Court of Appeals should have reversed the decrees for a preliminary injunction. It is true that ordinarily the decree of a District Court granting or denying a preliminary injunction will not be disturbed on appeal. But that rule of practice has no application where, as here, there was an insuperable

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& P. R. R. Co. *v.* Risty, 276 U. S. 567, 575; St. Louis-San Francisco Ry. Co. *v.* Alabama Public Service Commission, 279 U. S. 560, 563; Porter *v.* Investors Syndicate, 286 U. S. 461, 468, 471; United States *v.* Illinois Central Ry. Co., 291 U. S. 457, 463-64; Hegeman Farms Corp. *v.* Baldwin, 293 U. S. 163, 172; compare Red "C" Oil Mfg. Co. *v.* North Carolina, 222 U. S. 380, 394; Farncomb *v.* Denver, 252 U. S. 7, 12; Milheim *v.* Moffat Tunnel District, 262 U. S. 710, 723; McGregor *v.* Hogan, 263 U. S. 234, 238; White *v.* Johnson, 282 U. S. 367, 374; Petersen Baking Co. *v.* Bryan, 290 U. S. 570, 575; Pacific Tel. & Tel. Co. *v.* Seattle, 291 U. S. 300, 304. But because the rule is one of judicial administration—not merely a rule governing the exercise of discretion—it is applicable to proceedings at law as well as suits in equity. Compare First National Bank *v.* Board of County Commissioners, 264 U. S. 450, 455; Anniston Mfg. Co. *v.* Davis, 301 U. S. 337, 343.

10 Dalton Adding Machine Co. *v.* State Corporation Commission, 236 U. S. 699; Federal Trade Commission *v.* Claire Furnace Co., 274 U. S. 160; Lawrence *v.* St. Louis-San Francisco Ry. Co., 274 U. S. 588; St. Louis-San Francisco Ry. Co. *v.* Alabama Public Service Commission, 279 U. S. 560; compare Western & Atlantic R. R. *v.* Georgia Public Service Commission, 267 U. S. 493, 496, and cases cited in note 1, *supra*.

11 Such contentions were specifically rejected in Bradley Lumber Co. *v.* National Labor Relations Board, 84 F. (2d) 97 (C. C. A. 5); Clark *v.* Lindemann & Hoverson Co., 88 F. (2d) 59 (C. C. A. 7); Chamber of Commerce *v.* Federal Trade Commission, 280 Fed. 45 (C. C. A. 8); Heller Bros. Co. *v.* Lind, 86 F. (2d) 862 (App. D. C.); and Pittsburgh & W. Va. Ry. Co. *v.* Interstate Commerce Commission, 280 Fed. 1014 (App. D. C.). Compare United States *v.* Los Angeles & S. L. R. R. Co., 273 U. S. 299, 314; Lawrence *v.* St. Louis-San Francisco Ry. Co., 274 U. S. 588; Dalton Adding Machine Co. *v.* State Corporation Commission, 236 U. S. 699; McChord *v.* Louisville & Nashville Ry. Co., 183 U. S. 483; Richmond Hosiery Mills *v.* Camp, 74 F. (2d) 200, 201 (C. C. A. 5).

The cases cited by the Corporation are not opposed. Watson *v.* Sutherland, 5 Wall. 74; Pierce *v.* Society of Sisters, 268 U. S. 510; Walla Walla *v.* Walla Walla Water Co., 172 U. S. 1; Vicksburg Water Works Co. *v.* Vicksburg, 185 U. S. 65, 82; Hitchman Coal & Coke Co. *v.* Mitchell, 245 U. S. 229, 248; Pennsylvania *v.* West Virginia, 262 U. S. 553, 592, 593; City Bank Farmers Trust Co. *v.* Schnader, 291 U. S. 34; Truax *v.* Raich, 239 U. S. 33; Terrace *v.* Thompson, 263 U. S. 197, 215-16.

objection to the maintenance of the suit in point of jurisdiction and where it clearly appears that the decree was the result of an improvident exercise of judicial discretion.[12] Since the constitutionality of the Act has been determined by our decision in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, and the defect in the bill is incapable of remedy by amendment, its dismissal should be directed.[13]

Fifth. In No. 182, also, the Circuit Court of Appeals should have reversed the decree for a preliminary injunction and directed dismissal of the bill. The plaintiffs, officers of the so-called Plan of Representation of Employees, alleged, in addition to the facts already stated, that the employees are satisfied with their existing contracts of employment and desire to retain the existing Plan without change; that the holding of the proposed hearing will discredit the Plan and destroy its usefulness to the employees; that they will be deprived of their right to negotiate by the method of their choice, the value of which has been proved by years of operation; that alteration of the Plan will cause dissatisfaction among the employees; that operation of plant will be disrupted by labor disturbances; that employment will be interrupted; and that the damage to the employees will be irreparable. These additional allegations furnish no reason why the Board should be prevented from exercising the exclusive initial jurisdiction conferred upon it by Congress.

Decrees for preliminary injunction reversed with direction to dismiss the bills.

Mr. Justice CARDOZO took no part in the consideration or decision of this case.

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[12] Meccano Ltd. *v.* John Wanamaker, 253 U. S. 136, 141; Lawrence *v.* St. Louis-San Francisco Ry. Co., 274 U. S. 588 (*semble*); compare Prendergast *v.* New York Telephone Co., 262 U. S. 43, 50-51; National Fire Insurance Co. *v.* Thompson, 281 U. S. 331, 338; Alabama *v.* United States, 279 U. S. 229, 231; Rogers *v.* Hill, 289 U. S. 582, 587.

[13] Smith *v.* Vulcan Iron Works, 165 U. S. 518, 525; Mast, Foos & Co. *v.* Stover Mfg. Co., 177 U. S. 485, 494; Metropolitan Water Co. *v.* Kaw Valley Drainage Dist., 223 U. S. 519, 523; United States Fidelity & Guaranty Co. *v.* Bray, 225 U. S. 205, 214; Denver *v.* New York Trust Co., 229 U. S. 123, 136; compare In re Tampa Suburban R. R. Co., 168 U. S. 583, 588; Ex parte National Enameling and Stamping Co., 201 U. S. 156, 162; Meccano Ltd. *v.* John Wanamaker, 253 U. S. 136, 141.